(1) No. 94-____ Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Petitioners,

—against—

LEONARD JEFFRIES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requires university administrators to retain, in a position of leadership, a person who has engaged in a speech containing "hateful, poisonous and reprehensible" comments, reasonably believed by the administrators to be potentially harmful to the university, as well as "thuggish" conduct.

2. Whether for purposes of First Amendment analysis, speech containing such comments may be parsed or whether "each and every sentence" is constitutionally protected, even if the speech touches only in part on matters of public concern.

3. Whether it was clearly established, as of March 23, 1992, that university administrators who reasonably believed that such speech would cause disruption were nevertheless precluded by the First Amendment from removing the speaker from a leadership position.

LIST OF PARTIES

The following parties were appellants in the court below: Bernard W. Harleston, formerly the President of The City College of The City University of New York ("the College" or "The City College"); W. Ann Reynolds, the Chancellor of The City University of New York ("the University" or "CUNY"); and James P. Murphy, Edith B. Everett, Herman Badillo, Sylvia Bloom, Gladys Carrion, Louis C. Cenci, Michael J. Del Giudice, Stanley Fink, William R. Howard, Harold M. Jacobs, Susan Moore Mouner, Calvin O. Pressley, and Thomas Tam, members of the Board of Trustees ("the Board") of the University. All of these appellants are petitioners here, although petitioners Murphy, Carrion, Cenci, Del Giudice, Fink, Howard, Mouner, Pressley, and Tam were previously adjudicated not liable and petition solely to challenge the propriety of respondent's reinstatement as Chair of the Black Studies Department. Defendant Blanche Bernstein, another member of the Board at the time of the underlying events, died before the commencement of trial, was not included in the judgment, and did not appeal below. The appellee below, Leonard Jeffries, is the respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 21 F.3d 1238 (2d Cir. 1994) and is reproduced in the appendix at 1a. The August 4, 1993 opinion and order of the district court, rendering its final decision, is reported at 828 F.Supp. 1066 (S.D.N.Y. 1993), and is reproduced in the appendix at 27a. That opinion and order incorporated earlier orders, dated April 21, 1993 and May 11, 1993, reported at 820 F.Supp. 739 (S.D.N.Y. 1993), and 820 F.Supp. 741 (S.D.N.Y. 1993), and reproduced in the appendix at 83a and 88a, respectively. It also incorporated Verdict Forms 1 through 3, reproduced in the appendix at 87a, 93a, and 102a, respectively.

JURISDICTION

The judgment of the court of appeals was entered April 18, 1994. This court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are the First Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure. The texts of these provisions are reproduced in the appendix at 157a.

STATEMENT OF THE CASE

This case challenges the authority of university administrators to decide who may speak for the university. It arises at a time of raging national controversy concerning the appropriateness and legality of various attempts to prevent, limit, or penalize the verbal expression of racial, ethnic, religious, or other group-specific hatred. *See, e.g., R.A.V. v. City of St.*

Paul, Minnesota, 112 S.Ct. 2538 (1992). This tumult, in which universities, by dint of their function as a forum for the expression of ideas, play a front-line role, encompasses a broad array of issues, including, for example, the desirability of placing limitations on the choice of speakers at university-sponsored events, *see, e.g.*, Sanchez, *Comparing The Suffering Of Millions[,] Ex-Farrakhan Aide Minimizes Holocaust*, WASH. POST, Apr. 19, 1994, at B1, and the constitutionality of speech codes, *see, e.g.*, J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

Although the instant case has arisen during this debate, it presents a different question: whether the First Amendment bars administrators from refusing to reappoint, to a position of leadership, a person who has publicly engaged in speech thought to be detrimental to the purpose and nature of a public university. Respondent Leonard Jeffries was the Chair of the Black Studies Department at The City College at the time that he gave a highly-publicized speech containing clear elements of ethnic bigotry, characterized by the district court as "hateful, poisonous and reprehensible," and offensive to many. When his three-year term as Chair was due to be renewed, the Board renewed it for only one year and thereafter declined to renew it again. In this action, brought under 42 U.S.C. § 1983, and tried before a judge and jury, Jeffries sought and obtained reinstatement as Chair and also won punitive damages against the Chancellor of the University, the President of the College, and four members of the Board, alleging that their actions in denying him a full three-year term violated his right to free speech under the First Amendment. The award of punitive damages was vacated by the court of appeals, which remanded for a new trial on that issue. Petitioners now seek this Court's review on the ground that public university administrators are entitled, consistently with the First Amendment, to remove from a leadership position a person whose public statements can reasonably be expected to bring discredit upon the university and interfere with its proper functioning. As the national controversy over free

speech threatens to obscure the principles which should govern such employment decisions, it is important that this Court provide guidance.

1. Background

The City University is a large, publicly funded university system comprised of numerous senior and community colleges and other academic institutions. New York Education Law §§ 6201 *et seq.* (McKinney 1985). It is committed "to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and both sexes." *Id.* at § 6201(3).

Within each college are departments covering various academic disciplines. CUNY Bylaws § 9.1. Respondent Leonard Jeffries is a tenured professor in the Black Studies Department at The City College (A13),[1] one of the flagship colleges of the university system and an institution with a long and illustrious history. Jeffries served several successive terms as the Department's Chair, running from 1972 through the time pertinent to this litigation, the 1991-92 academic year (A14-15).

Although section 9.3 of the Bylaws enumerates various duties of the chair, certain of which could be categorized as ministerial (142-43a), section 9.1c sets forth the core obligations upon which the president is required to focus in making his recommendation. A chair is to serve not only as "the departmental administrator and spokesman" but also as "a participant in the formation, development and interpretation of college-wide interest and policy" (139a). The Provost of the College at the time of the speech, Robert Pfeffer, testified at trial that that section means "any department chair serves as a spokesman for college-wide policy and articulates that policy." (A510). Similarly, the President testified that "the chairperson is expected to represent and articulate the values and standards of the college and to be found as a chairperson

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[1] "A" denotes the Appendix submitted to the court of appeals.

making . . . derisively ethnic remarks is simply inconsistent with that assignment" (A625-26).

In December 1984, an applicant for Director of International Studies accused Jeffries of having made anti-Semitic comments at an interview luncheon (113-17a, 119-21a). Several of the faculty who were present confirmed this account (EA68-71).[2] Following an investigation, the Acting Dean of Social Science stated that Jeffries' actions "demonstrate[d] that he does not have the judgment and moral responsibility required of the chairman of an academic department at an institution such as The City College" (118a). He recommended Jeffries' removal as Chair.

The President, petitioner Harleston, reprimanded Jeffries instead (122-24a). He specifically warned Jeffries, however, that the remarks of which he had been accused were "intolerable and indefensible . . . for individuals functioning in a role such as Department Chair, which makes them representatives of the College," and that there could be "no further instances in which you, in your leadership role, create through insensitive comments or remarks the perception that the College supports racial or ethnic bigotry" (124a). Harleston reiterated this view in a letter to the College community. (107a).

2. The July 20, 1991 Speech

On July 20, 1991, Jeffries made a speech before the Empire State Black Arts and Cultural Festival that was videotaped and later televised (A441). In the introductory remarks, plaintiff was identified as the Chair of Black Studies at CUNY (PX3 at 01:42).[3] Although the opening paragraphs of the speech address "the storm around the [multicultural] curriculum" (PX3 at 04:40), its focus was largely a response to

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[2] "EA" denotes the Exhibit Appendix submitted to the court of appeals.

[3] "PX3 at __" denotes elapsed time (in minutes and seconds) in Plaintiff's Exhibit 3, a videotape submitted separately to the court of appeals. A copy of this videotape has been lodged with the Clerk's office.

what plaintiff deemed to be "the defamation of my character" (*id.* at 07:50) by persons who had taken issue with his proposals.

The speech took a turn which the district court described as "hateful, poisonous, and reprehensible" (28a) as well as "racist and bigoted" (35a). Plaintiff opined that negative images of African peoples in the film industry were the result of:

> a conspiracy, planned and plotted and programmed out of Hollywood, where people called Greenberg and Weisberg and Trigliani and whatnot—it's not being anti-Semitic to mention who developed Hollywood. Their names are there. MGM: Metro-Goldwyn-Mayer, Adolph Zukor, Fox. Russian Jewry had a particular control over the movies, and their financial partners, the Mafia, put together a system of destruction of black people.

Id. at 16:15. He then moved on to what the district court termed "strident attacks" (30a) on specific individuals who had purportedly challenged his views on multicultural education, who were responsible, in his view, for "the war against the African," and who were thought by him to be Jewish (*id.* at 17:20).

He described Diane Ravitch, a former member of the faculty at Columbia University, and an official in the United States Department of Education at the time, as the "ultimate, supreme, sophisticated, debonair racist" (*id.* at 18:00) and a "sophisticated Texas Jew" (*id.* at 24:40), and repeatedly referred to her as "Miss Daisy" (*id.* at 18:08, 24:10, 1:00:13, 1:14:54). He stated that "the Ravitches, who happen to be Jewish, have blinded us on the attack coming from the Jewish community—systematic, unrelenting" (*id.* at 25:00).

After reiterating that it is "[n]ot anti-Semitic to raise the issue", he also described "an orchestrated attack by the Schlesingers and Shankers, working with white conservatives" (*id.* at 25.20). He suggested that Arthur Schlesinger,

a professor at CUNY's Graduate Center, had included a photograph of Jeffries in a book to "target" him for death (*id.* at 25:45). He also referred to Bernard Sohmer, a mathematics professor and the College Ombudsman as "the head Jew at City College" (*id.* at 27:08).

A substantial portion of the balance of the speech was devoted to an explication of the purported role of "rich Jews" in the enslavement of Africans (*id.* at 26:50, 33:55, 39:20), with references to "the ten volumes dealing with the Jewish relationship with the black community in reference to slavery" Jeffries and others were preparing "so there'll be no question about Miss Daisy [or] Arthur Schlesinger" (*id.* at 37:45, 39:08). Jeffries stated that he "had not touched the Jewish question for the past year" because of a promise to "my Jews at City College" (*id.* at 43:00).

The speech received wide publicity, and reactions were largely negative (147a; A442-43). Sohmer stated in a letter to Jeffries, "I . . . find your pervasive anti-Semitism one of the most repugnant things I have ever been exposed to," and demanded an apology (113a). Pfeffer testified that he, too, was disturbed by the "head Jew" comment and that some of his colleagues believed it referred to him (A510-1, 541-2).

The Faculty Senate of The City College, though recommending no punitive action, "deplore[d] the breach of academic courtesy and decorum in the ethnic slurs used by [Jeffries] to refer, first, to a colleague and a member of this body, and second, to a larger group of colleagues" (135a). A chair who served on committees with Jeffries viewed "[t]he breaches of professional conduct" as "so very serious that he has thereby disqualified himself from carrying out the duties and responsibilities of academic leader of the Black Studies Department, as defined by the CUNY Bylaws" (EA19).

Harleston testified that he viewed the personal attacks and anti-Semitic sentiments with alarm (147a, 151-52a). He considered the speech to be inimical to the University's stated

mission of enhancing diversity and pluralism (152a) and issued a statement, on August 8, 1991, noting that although the remarks had been "made at an event unrelated to the College, they nonetheless undermine our determination to maintain an environment characterized by civility and mutual respect, and free of racial, religious and ethnic conflict" (131a). He also testified to an outpouring of letters from alumni and other members of the public (147-48a, 152a).

Chancellor Reynolds testified that she also was concerned about these attacks (A488). In a press release issued with the Board's Chair, petitioner Murphy, and Vice Chair, petitioner Everett, she observed that "[t]he mission of The City University of New York is to provide access to an excellent education to all of the people of New York" and that Jeffries' "remarks threaten that mission and seriously challenge the delicate balance between academic freedom and responsibility" (146a).

3. The Review And Subsequent Events

Harleston testified that he sought guidance from several members of his administration (A616-7). In a memorandum dated August 14, 1991, Provost Pfeffer stated that because a chair "holds a position which is defined, in part, as administrative and policy-making, you have grounds for initiating Jeffries' removal" (106a). Pfeffer reminded Harleston that Jeffries had been warned, once before, that anti-Semitic comments would not be tolerated (107a).

Harleston asked Pfeffer to conduct a formal review (148-49a). Pfeffer was instructed to ignore the content of the July 20, 1991 speech but to focus on "the impact his public statements have had, if any, upon the present operations of the College, and his department" (*id.*). By happenstance, Jeffries' term as Chair of Black Studies had elapsed on July 31, 1991 and was thus due for renewal by the Board at its October meeting. Pfeffer issued his report on October 4, 1991 (A514-15, 647).

Although Pfeffer concluded that Jeffries had carried out his duties adequately during that period, he cautioned that "[i]n light of the limited time that has been available for observations (3 months), it is difficult to ascertain whether all of the duties of the chairperson have been fulfilled to date," and that "you and others in the administration might have had questions concerning Professor Jeffries' performance as chair prior to July 1991" (EA3). Pfeffer queried whether Jeffries' capacity to act as an administrator, spokesman and participant in policy should be assessed in light of the speech, but concluded that Harleston's charge precluded such an evaluation (EA5-6).[4]

Harleston testified that he was frustrated by this narrow interpretation and recommended that Jeffries be reappointed only for one year so that his performance could be further evaluated (A638, 642-43). Chancellor Reynolds supported Harleston's recommendation (A439), and it was placed before the Board, together with the recommendations for 15 other departments (EA138-41).

Reynolds and several trustees testified that Harleston outlined long-held concerns about Jeffries' leadership of the Department and presented his recommendation on that basis (A438-40, 715-16, 749-51, 865-66); that the Vice-Chancellor for Legal Affairs advised the trustees to base their deliberations upon Jeffries' performance, and the President's concerns, and not ideas expressed in the speech (A717, Tr.[5] 1280-81); and that trustees Everett, Badillo, Bernstein, and Jacobs had expressed the view (and ultimately voted) that Jeffries should not be reappointed, even for a one-year term,

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[4] Pfeffer's report purported to be based, in part, upon advice from Jeffrey Rosen, Dean of the Division of Social Sciences (EA15, 29). At trial, however, Rosen conceded that he had propped Jeffries up during this period (A327, 336-37) to preserve ongoing efforts, initiated before the speech, to bring about a transition of leadership in the Department with Jeffries' cooperation (A269-84).

[5] "Tr." denotes the trial transcript.

in light of the speech (A481-83, 871-73, 883-84). A majority accepted Harleston's recommendation (A140-41). Petitioner Bloom, who had once expressed opposition to Jeffries' reappointment, abstained (A482).[6]

Pfeffer and Rosen testified that during the autumn of 1991, Jeffries' performance deteriorated, particularly concerning a critical faculty recruitment effort[7] (A305-13, 518-19). They indicated that they conveyed their observations to Harleston, who asked them to make one more effort to persuade Jeffries to relinquish the Chair voluntarily (A313-14, 548-49). On November 12, 1991, they spoke to plaintiff to no avail (136-37a).

On two prior occasions during this time frame; at the November 12, 1991 conference among Jeffries, Pfeffer, and Rosen; and on one occasion shortly thereafter, Jeffries exhibited aberrant and inappropriate behavior. On October 18, 1991, Jeffries was interviewed by a student reporter from the *Harvard Crimson* (126-31a, 153-60a). During the interview, taped with Jeffries' knowledge, Jeffries described Henry Louis Gates, the Chair of African American Studies at Harvard University, as "a faggot and a punk" (128-29a, 153a). He also described two other prominent African-Americans in similar terms and disparaged homosexuality (129a, 154-55a). Shortly thereafter, Jeffries threatened to "kill" the reporter if these statements ever appeared in print (129, 155a). At the conclusion of the interview, Jeffries had one of his companions confiscate the student's tapes (130a, 155-56a).

Toward the end of October, Jeffries claimed to have "learned from one of the student leaders . . . that Prof[essor] Silver

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[6] During the same time period, the faculty of the Black Studies Department rejected Dean Rosen's plan for a collegial transition of leadership in the Department (A304-05).

[7] Jeffries disputed this assessment (Tr. 316). At trial he sought to establish that the search process was completed, after the deadline was extended twice (A338-44). From the administration's perspective, however, the Department's failure to make timely progress caused considerable alarm.

[the Chair of the Economics Department] said that they were going to start an investigation of the Black Studies [D]epartment, looking into individual faculty members" (A374). Jeffries confronted Silver and had "intense words" with him (*id.*). Shortly thereafter, Jeffries wrote to Dean Rosen to place him, Silver, the Provost, and the President on notice "that if this faculty wants war it will get it—enough is enough. We will fight fire with fire" (112a).

On November 12, 1991, when Pfeffer and Rosen attempted to persuade him to step down as Chair, Jeffries suggested that "the Jews were out to get him" (A317) and told Pfeffer and Rosen that "any efforts to dislodge him as chair would be met with massive community resist[a]nce that 'would make Crown Heights pale in comparison' " (136a; A318, 530).

Three days later, purportedly after seeing a television interview of Harleston and Reynolds, and believing that he had been "branded a demon," Jeffries waylaid Harleston in the lobby of the administration building to "confront him . . . man to man" (A376), and upbraided him in an angry and hostile manner (149-50a).

Harleston testified that he became convinced that the Department needed new leadership, regardless of the reasons for Jeffries' conduct (151a). Harleston instructed Pfeffer and Rosen to commence a search (A660). Edmund Gordon, a former Chair of African-American Studies at Yale University, described by the district court as "one of the most eminent Black Studies scholars in America" (28a), was recommended, and the Board accepted the recommendation on March 23, 1992. (A660-70; EA145). Gordon assumed the chair on August 1, 1992. Jeffries remained a tenured professor in the Department, with no diminition of his salary or benefits.

4. The Trial

a. Ruling On Speech

Prior to the presentation of evidence, the district court asked counsel whether the "speech of July 20, 1991 [is] constitutionally protected in that it relates to matters of public concern . . . ." (Tr. [4/20/1993 a.m.] at 13-14). Counsel for petitioners asserted that it contained both constitutionally protected material and statements that did not touch upon matters of public concern and thus were not protected in the public employment context (*id.* at 17-18). Counsel identified, as examples, Jeffries' "remarks about the head Jew [of City] [C]ollege, Bernard Sohmer, . . . [and] the personal attacks on Diane Ravitch and Arthur Schlesinger" and posited that "[i]f the jury believes that [petitioners] acted because [Jeffries] said nasty things about specific people, rather than that he expressed certain ideas that they disagree with, . . . the defendants are essentially home free at that point" (*id.*).

The following day, the district court issued an order flatly rejecting counsel's argument:

> Having found that Jeffries' speech touches upon matters of public concern, the Court will not allow the Attorney General to splice and fragment the accompanying constitutional protection in a manner that would severely weaken the constitutional safeguard and might well distort the full, contextual meaning of the speech. Accordingly, the Court finds that Jeffries' whole speech, each and every sentence, is constitutionally protected. [84-85a]

b. The Jury Verdict

The district court submitted several questions to the jury, the first four of which concerned the First Amendment. The jury was asked (1) whether the July 20, 1991 speech was a "substantial or motivating factor in the denial of plaintiff's

three-year term as Chairman of the Black Studies Department" (to which the jury answered "yes"); (2) whether petitioners had shown by a preponderance of the evidence that Jeffries would have been denied a full three-year term as Chair even if he had not made his speech (to which the jury answered "no"); and (3) whether petitioners had proven by a preponderance of the evidence that the speech "hampered the effective and efficient operation of the Black Studies Department, the College, or the University" (to which the jury answered "no") (93a). The jury was then asked:

> 4. If the answer to question #3 was "no," have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University?

The jury answered "yes" (*id*).

c. Pickering Balancing

Following this verdict, the district court balanced "the interests of the plaintiff . . . 'in commenting upon matters of public concern,' against the interests of his employer, City University, 'in promoting the efficiency of the public services it performs through its employees' " pursuant to *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) (89a). In an order dated May 11, 1993, the court held that the speech "substantially involved matters of public concern and 'should be accorded significant weight in the *Pickering* balance' " (quoting *Piesco v. City of New York, Dep't of Personnel*, 933 F.2d 1149, 1157 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991)) (90a). Based upon this holding and the jury's failure to find that the operations of CUNY had actually been hampered, the court held that Jeffries' interest in making the speech outweighed petitioners' interest in the public behavior of an administrator, spokesperson, and participant in college-wide

interest and policy. Accordingly, it held that petitioners had violated Jeffries' First Amendment rights (92a).

d. Assessment Of Damages

The district court then submitted two additional sets of questions to the jury. Pursuant to the first set, the jury found that a majority of the Board, petitioners Murphy, Carrion, Cenci, Del Giudice, Fink, Howard, Mouner, Pressley, and Tam, had *not* been motivated by the speech (and thus had not violated Jeffries' rights) (93-99a). The jury also found, however, that the speech *was* a substantial or motivating factor for Harleston, Reynolds, and four members of the Board, petitioners Everett, Badillo, Jacobs, and Bloom, and that none of them would have reached the same decisions in the absence of the speech (93-95a, 97a).

The final set of questions required the jury to determine, as to each of these six individuals, whether he or she had "acted with malicious intent to violate the plaintiff's rights under the first amendment . . . or with malicious intent to unlawfully injure him or that [he or she] acted with a callous or reckless disregard of the plaintiff's first amendment rights" (102-04a). If so, the jury was directed to decide whether to award punitive damages and, if so, to specify an amount (*id.*). The jury assessed punitive damages of $30,000 against Harleston, $50,000 against Reynolds, and $80,000 apiece against the four trustees[8] (*id.*).

5. The August 4, 1993 Opinion And Order

Petitioners moved for judgment as a matter of law or a new trial. *See* F.R.Civ.P. 50(b), 59(a). By Opinion and Order dated August 4, 1993, the district court dismissed Jeffries' due process claim, reduced the damage awards against Harleston and Reynolds to $15,000 and $25,000, respectively, and otherwise

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[8] Jeffries did not seek compensatory damages (A240).

denied petitioners' motion (27-82a). The court reinstated Jeffries for a period of two years (71-81a).

The district court acknowledged the "egregiously offensive and destructive nature of [Jeffries'] statements and the widespread dismay and alarm they have evoked" (78a). It also noted that "the Chairmanship gives its holder a significant degree of power and influence over the policies and direction of the Black Studies Department" and "carries with it a prestige both within and outside the University" (71a). Nevertheless, the court concluded that the Jeffries' "strident attacks" and "derogatory comments" (30a) did not provide a sufficient basis for denying him a full three-year term as Chair, relying, again, on *Piesco* (60a).

The court denied qualified immunity, reasoning that it had been denied in *Piesco*, 933 F.2d at 1160-61, and that the court's own decision in *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992), had "put defendants on notice that retaliation against a faculty member for out-of-class speech that does not interfere with the functioning of the University is unconstitutional" (61a).

The court deemed its reinstatement of Jeffries as Chair of Black Studies "the most troubling and nettlesome aspect of this case" (71a). Although the court credited the evidence concerning the four episodes of aberrant behavior (36-38a), and acknowledged that Jeffries' conduct was "thuggish, and incompatible with the civilized discourse and conduct expected of tenured professors," it declined to hold that the incidents "taken, as a whole, rise to a level that would justify denying plaintiff injunctive relief" (74a).

6. The Court Of Appeals' Decision

The court of appeals affirmed the district court's holding that petitioners Harleston, Reynolds, Everett, Badillo, Bloom, and Jacobs had violated Jeffries' First Amendment rights

(20a), and that they were not entitled to qualified immunity (23a), but vacated the award of punitive damages, remanding "for a new trial to decide whether Jeffries should recover punitive damages from these six defendants" (26a).

In reaching these conclusions, the court reasoned that:

> Jeffries' speech unquestionably involved public issues. . . . True, the tenor of Jeffries' speech was less than ingratiating, and, as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it. But First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided. [15a.]

The court dismissed the significance of the jury's finding that petitioners had been motivated by a reasonable expectation of harm, reasoning that petitioners had not shown "that Jeffries' speech interfered with CUNY's operation," and that

> [g]enerally, interference in this context entails impairing employer discipline, causing disharmony among coworkers, disrupting close working relationships where loyalty and confidence are essential, failing to perform one's duties, or frustrating the regular operation of the government enterprise in question. [17a.]

Although the court conceded that "[h]ow much interference the government must show to justify sanctioning an employee for his speech will vary," the only factor it identified as relevant in determining what quantum would suffice was:

> the degree that the speech involved matters of public concern. If the speech only tangentially touched on public issues, the government need not wait until "the disruption of the office and the destruction of working relationships is manifest" before taking action. If, alter-

> natively, the speech substantially addressed public issues, the government must show the statements "actually undermined the effective and efficient operation" of the employee's department. [*Id.* (Citations omitted.)]

The court concluded that because "Jeffries' speech substantially concerned public issues, the defendants shoulder the weightier burden of showing that the speech *caused substantial disruption* at CUNY." *Id.* (Emphasis supplied.)

The court rejected petitioners' argument that they should be entitled to prevail on a lesser showing as to impact because Jeffries held a highly visible policymaking position, reasoning that they had "not shown how Jeffries, by virtue of his position as department chair, could undermine CUNY's mission with his speech"; that the University Bylaws "do not vest him with the power to make policy"; and that the "department chairman performs an essentially ministerial role . . ." (18a). The court also rejected petitioners' assertion that four trustees, standing alone, could not cause injury to Jeffries, holding that "[a] plaintiff may establish causation under section 1983 if he shows that the defendants participated in, or were 'moving forces' behind, the deprivation" (19a).

Finally, the court rejected petitioners' argument that they were entitled to qualified immunity on the ground that, "[b]y July 20, 1991, both the Supreme Court and the Second Circuit had held repeatedly that, absent a disruption of government operations, a public employer may not sanction an employee for speaking on issues of social or political concern" (21a).

The court accepted petitioners' argument that the award of punitive damages was inconsistent with the jury's earlier finding that petitioners had been motivated by a reasonable expectation that the speech would harm the university (24a). It declined, however, to adopt their argument that the questions on punitive damages should never have been submitted to the jury, and that the answers, therefore, should be disregarded (25a).

REASONS FOR GRANTING THE PETITION

This case raises the issue of whether the First Amendment compels a university to retain, in a position of leadership, a person who has engaged in hate speech. The approach of the court below essentially immunizes the speaker from adverse consequences, where the bigoted elements are surrounded by protected material, unless the employer can prove, to a jury's satisfaction, that the speech actually hampered the university's operations. Because the Second Circuit's practice requires a showing of concrete impact in all but a few cases, university administrators may no longer act to protect their institutions until harm is "manifest," an approach which is antithetical to responsible stewardship.

The Second Circuit's refusal to grant qualified immunity in all but the most frivolous of these First Amendment cases further discourages responsible administrators from taking decisive action. Only by illuminating the rules which should pertain where speech found to be "hateful, poisonous and reprehensible" is interwoven with speech held to touch on matters of public concern, and where the speaker holds a position of leadership, can the Court ensure effective management of public institutions.

I

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH *PICKERING* PRINCIPLES AS APPLIED BY THIS COURT AND INTERPRETED BY OTHER CIRCUITS

A. *Waters v. Churchill* Requires That University Administrators Prevail Where They Were Motivated By A Reasonable Expectation That The Speaker's Words Would Harm The University

This Court recently observed that

> [w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Waters v. Churchill, 114 S.Ct. 1878, 1887-88 (1994) (plurality opinion). The Court further noted that "we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential." *Id.* at 1887 (citations omitted).

These observations are distilled from a series of decisions in which the Court established a multi-faceted approach to First Amendment claims against public employers. *See Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). In the earliest of these cases, *Pickering*, this Court described the task as one of "arriv[ing] at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

In *Connick*, which involved an assistant district attorney, the Court established that a trial court must undertake a "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." 461 U.S. at 150. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.*

Despite the lack of concrete evidence of actual harm, the Court upheld Myers' dismissal, because

> [w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Id. at 151-52. As the Court had found that only one of the items to which Myers had referred touched upon a matter of public concern, *id.* at 148-49, however, it "caution[ed] that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern," *id.* at 152. Nevertheless, the Court did not define that showing in terms of the necessity of establishing actual harm. *See also Waters v. Churchill*, 114 S.Ct. at 1887 (describing "a substantial showing" as one demonstrating "that the speech is, in fact, *likely* to be disruptive") (emphasis supplied).

In *Rankin*, the Court observed that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails," 483 U.S at 390. The Court grounded its holding that the incident underlying that case did not justify dismissal on two factors: (i) that the plaintiff was a low-level employee, not holding a "confidential, policymaking, or

public contact role," *id.* at 390-91, and thus not likely to have undermined her employer's mission with her remarks; and (ii) that the remark at issue was made in the office, to a peer, and was not intended for wider dissemination, *id.* at 389. Therefore, there was no "danger that [the employee] had discredited the office." *Id.*

The principles articulated in *Waters* build upon these cases and demonstrate the flaws in the decision below. A plurality held that lower courts should "look to the facts *as the employer reasonably found them to be*." 114 S.Ct. at 1889 (emphasis supplied). That is precisely what the district court and the Second Circuit failed to do here.

The decisions below are premised on arbitrary distinctions between actual harm and the reasonable anticipation of harm. For example, although the district court itself acknowledged the "egregiously offensive and destructive nature of Jeffries' statements and the widespread dismay and alarm they have evoked," the jury found no actual impact; the district court not only upheld that finding, which reflected some confusion as to the definition of harm, but also held that it was dispositive as to liability. Conversely, although the jury found that petitioners reasonably believed that the speech would harm the University, the district court and court of appeals ignored that finding. Indeed, the district court erroneously submitted the issue of punitive damages to the jury, notwithstanding the clear meaning of the jury's earlier response that the requisite state of mind was lacking. The court of appeals then discarded the finding that petitioners had been motivated by a reasonable expectation of harm as "irreconcilable" with the findings, reached several days later, that punitive damages could appropriately be assessed against the six petitioners held to have been motivated by the speech.[9]

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[9] The court of appeals' resolution of the conflict between these findings was erroneous. As the district court (i) submitted two more rounds of questions to the jurors, one to establish individual liability, and one to establish both the appropriateness of awarding punitive damages

Given the jury's finding that petitioners reasonably believed the speech would harm the University, and this Court's observation, in *Waters*, that such expectations are entitled to substantial deference, petitioners should have prevailed, even without any finding of actual hampering. Just as it was improper for a court to expect the government manager in *Waters* to "ask not what conclusions she, as an experienced professional, [could] draw from the circumstances, but rather what conclusions a jury would later draw," petitioners here should have been permitted to rely upon common sense, "hearsay, or . . . what [they knew] about the accused employee's character" in determining whether to renew Jeffries as Chair. 114 S.Ct. at 1888. These considerations would have justified Jeffries' immediate removal, let alone Harleston's more conservative recommendation to first limit Jeffries to a one-year term.

The four episodes of aberrant conduct during that one-year term vindicated Harleston's concerns and constituted a good reason, even standing alone, not to reappoint Jeffries afterward. The Second Circuit erred in failing to weigh petitioners' original concerns in conjunction with Jeffries' behavior. "Thuggish" conduct, "incompatible with civilized discourse," justifies nonrenewal regardless of its genesis.

In giving short shrift to Jeffries' position, petitioners' "reasonable predictions of disruption," and Jeffries' conduct, the court below applied a two-dimensional analysis. Under the Second Circuit's jurisprudence, as currently established, in every case where, as here, the speech is of more than minimal

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and the amounts to be awarded, if any; and (ii) twice instructed the jurors that they could properly award punitive damages against individual petitioners found to have been motivated by the speech (Tr. at 2122-24, 2139), notwithstanding the jury's prior finding as to state of mind, the jurors' findings as to punitive damages were not caused by any confusion on *their* part but rather were a result of the district court's own actions in submitting the issue of punitive damages to the jury. Because this set of questions should not have been submitted to the jury at all, the court of appeals should simply have stricken the answers rather than remanding for a new trial.

interest, a showing of actual impact is required, regardless of the importance of the speaker's position, the reasonableness of the employer's concerns, the manner in which the speech was broadcast, or the extent to which it included elements of personal animus or bigotry. That approach runs counter to this Court's determination not to "attempt to lay down a general standard against which all such statements may be judged," *Pickering*, 391 U.S. at 569, and its requirement of particularized balancing.

Under any view other than the rigid one followed by the Second Circuit, the *Pickering* balancing in this case required an outcome favoring the University administrators. The court of appeals' assertions that petitioners had not shown how Jeffries' speech could undermine the University's mission and that his duties were "essentially ministerial" were simply erroneous, as a matter of law. Although some of a CUNY chair's tasks are ministerial, the quality which a president is required, by *law*, to consider in recommending a candidate is "the capacity of the individual selected to act effectively as the departmental administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy." The plain meaning of this phrase contradicts the Second Circuit's holding that the Bylaws "do not vest [the chair] with the power to make policy."

Further, the nexus between bigoted speech and the University's mission was made clear in Harleston's warning to Jeffries, in 1985, that department chairs were expected to comport themselves as "representatives of the College" (124a). Petitioners offered several additional explications of this point, including the reactions, after the speech, of the Provost; the President; and the Chancellor, Chair, and Vice Chair of the Board (106-07a, 111-12a, 145-46a). In addition, Harleston noted at trial that Jeffries' speech repelled potential financial donors (152a).

Moreover, the notion that First Amendment protection "extends to all speech on public matters, no matter how vulgar or misguided" is contradicted by *Pickering* and its

progeny, which clearly contemplate that protections which apply to speech outside the public employment context do not necessarily apply in *Pickering* cases. Although, as this Court recently observed in *Waters*, "[t]he First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of . . . the process of open debate,' " 114 S.Ct. at 1886, quoting *Cohen v. California*, 403 U.S. 15, 24-25 (1971), which overturned a conviction for wearing the slogan "Fuck the Draft" in a courthouse, this Court has "never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to the people with whom they work," *Waters*, 114 S.Ct. at 1886. Here, where Jeffries' speech offended many, including the public at large and people with whom he worked, the petitioners should have been permitted to remove him as a spokesperson for the College.

The Second Circuit's approach also conflicts with the decisions of several other circuits. In *Hall v. Ford*, 856 F.2d 255 (D.C.Cir. 1988), for example, the District of Columbia Circuit upheld the firing of a university department head. Hall, a tenured faculty member, was appointed Athletic Director and charged with bringing the Athletic Department into compliance with NCAA rules. *Id.* at 257. During the course of his service as Director, Hall "publicly voiced his concerns about . . . possible violations," *id.*, and was ultimately fired. The D.C. Circuit upheld the trial court's dismissal of his case, noting that Hall's position "related to a policy area," that his speech "directly interfered with the Board of Trustees' interests," and that "he was a highly visible spokesman for the University's athletic program, likely to be thought of by the public as responsible for running the department." *Id.* at 265. That court, in stark contrast to the Second Circuit, thus reasoned that heading a department at a university falls within " 'that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech.' " *Id.* at 267.

Two circuits have recognized that statements of ethnic or racial bigotry may be inherently corrosive to a public employer's mission. In *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985), for example, a sheriff's interest in avoiding an "explosive racial situation" was held to justify dismissal of a file clerk who had been identified, on television, as both a member of the Ku Klux Klan and an employee of the sheriff's office. *See also Mings v. Department of Justice*, 813 F.2d 384, 388-89 (Fed. Cir. 1987) (potentially disruptive effect of letter reflecting anti-Hispanic and anti-Catholic bias "substantially outweighed" whatever public interest it addressed).

Other circuits, unlike the court below, have held that speech containing personal attacks is entitled to less weight in *Pickering* balancing and that administrators can prevail even without a showing of actual harm. *See, e.g., Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1324 (11th Cir. 1989) ("a reasonable County Manager could take into account the *potential* effect of Dartland's insulting speech on the Manager's other subordinates") (emphasis supplied); *Benson v. Allphin*, 786 F.2d 268, 278 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) (court must consider "whether the expression would create problems in maintaining harmony" or "*could* lead to controversy and conflict among officials") (emphasis supplied). *But see Melton v. City of Oklahoma City*, 879 F.2d 706, 715-716 (10th Cir. 1989), *reversed in part en banc on other grounds*, 928 F.2d 920 (10th Cir.), *cert. denied*, 112 S. Ct. 296 (1991); *Roth v. Veteran's Administration*, 856 F.2d 1401, 1407 (9th Cir. 1988); *Matherne v. Wilson*, 851 F.2d 752, 761 n.53 (5th Cir. 1988); and *Zamboni v. Stamler*, 847 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988), each holding that a showing of actual harm was required to defeat the plaintiff's interests. The Second Circuit's holding as to petitioners' alternative argument, that the conduct of the four trustees, even if otherwise actionable, caused no injury to Jeffries, is also in conflict with the rule followed by another circuit. *See Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982) (vote of an

unconstitutionally motivated council member did not cause a violation of the plaintiffs' rights when the votes of properly motivated members, taken alone, were sufficient to account for the result).

B. Unprotected Statements Are Not Immunized Merely Because They Are Surrounded By Protected Statements

The decision in *Waters*, which post-dates both decisions below, establishes an additional reason why the district courts' finding of liability constituted legal error. In *Waters*, a plurality of this Court held that the "potential disruptiveness" of Churchill's speech was "enough to outweigh whatever First Amendment value the speech might have had," even if the balance of the speech was about an issue of public concern. 114 S.Ct. at 1891. It observed further that

> So long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. The *Connick* test is to be applied to the speech for which Churchill was fired. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements. [*Id.* (Citations omitted.)]

At trial, the district court rejected petitioners' argument that some portions of Jeffries' speech, *i.e.*, his attacks on individuals and various groups on the basis of their ethnicity, did not constitute matters of public concern.[10] It held that "the

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[10] Second Circuit authority precluded petitioners from pursuing this argument below. *See Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 147 (2d Cir. 1993) (concurring opinion), in which Judge Newman noted that the Second Circuit has established a bifurcated system pursuant to which speech "must be placed either in the 'public concern'

fact that the defendants were motivated by only particular sections of the speech is in no way a defense to the civil allegations" (86a). This holding, affirmed by the Second Circuit, is in direct conflict with the plurality opinion in *Waters* (which, as Justice Souter observed, in a concurring opinion, is now the governing law, 114 S.Ct. at 1893) and should be reversed.

II

THE SECOND CIRCUIT'S INTERPRETATION OF THE DOCTRINE OF QUALIFIED IMMUNITY CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

Although the Court has addressed the doctrine of qualified immunity at some length in recent years, adopting a test of objective reasonableness in *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982); describing the junctures at which the defense may be asserted in *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985); and addressing the level of particularization at which the availability of the defense must be determined in *Malley v. Briggs*, 475 U.S. 335, 341-46 (1986) and *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), this petition concerns the availability of qualified immunity in the context of a *Pickering* claim, an issue not previously ruled upon by the Court, but, as made plain by the facts of this case, now warranting its attention. Because the Second Circuit has applied the doctrine at a level of generalization that precludes immunity in all but the most frivolous of cases, making the protection intended by this Court virtually unavailable, and because "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," *Anderson*, 483 U.S. at 638, the issue merits review by this Court.

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category or the 'private interest category.' " Petitioners, however, preserved this issue. *See* Defendants-Appellants' Brief at 38 n.19.

In *Harlow*, the Court held that government officials sued under the Constitution or 42 U.S.C. § 1983 "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. By "defining the limits of qualified immunity essentially in objective terms," *id.* at 819, the Court sought to reduce the social costs entailed by providing remedies for constitutional violations. *Id.* at 816-18. Attempting to determine the availability of the defense prior to trial is important because "[t]he entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. In the instant case, petitioners were required to go to trial once with respect to actions which a reasonable official in their positions could have believed consistent with Jeffries' First Amendment rights. Forcing six of them to undergo a second trial for damages further erodes the salutory purposes underlying the defense.

If the unlawfulness of an administrator's actions must be apparent in order to impose liability in damages, *Anderson*, 483 U.S. at 640, then qualified immunity should apply where the legality of an action can be determined only through a particularized balancing process which this Court itself has described as "difficult," even for courts, and where the facts make the determination of the proper balance a close question. If, as this Court most recently determined in *Waters*, 114 S.Ct. at 1887, "reasonable predictions of disruption" by government managers are entitled to substantial deference, it would not have been apparent to a reasonable university administrator that actions found by the jury to have been based on such predictions would violate Jeffries' First Amendment rights. The district court held that its decision in *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992), should have placed petitioners on notice that denying Jeffries a full

three-year term due to the speech would violate his clearly established federal rights. The Second Circuit, however, had not yet issued its opinion in the *Levin* case when petitioners acted here. Moreover, Professor Levin was a teacher, not a department chair. Because officials "of reasonable competence could disagree" on the appropriate course of action here, qualified immunity should have been granted. *Malley*, 475 U.S. at 341.

Other circuits have recognized the peculiar difficulties which *Pickering* cases present. As noted by the Fifth Circuit in *Noyola v. Texas Department of Human Resources*, 846 F.2d 1021, 1028 (5th Cir. 1988):

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights. *Connick* and *Rankin* exemplify the difficulty of delineating any bright-line constitutional rule that might furnish a test for denying qualified immunity in such actions.

Accord, *Dartland v. Metropolitan Dade County*, 866 F.2d at 1323. *See also Benson v. Allphin*, 786 F.2d at 276 ("while it may have been clear since 1968 that a citizen does not forfeit his First Amendment rights entirely when he becomes a public employee, the scope of those rights in any given factual situation has not been well defined"); *Melton v. City of Oklahoma City*, 879 F.2d at 729 ("where *Pickering* balancing is required, the law is less likely to be well established than in other cases").

In rejecting qualified immunity in this and prior *Pickering* cases, the Second Circuit considered the question at an improperly high level of generalization. It assumed a far greater degree of clarity as to the showing required to defeat a plaintiff's interest in speech similar to the address at issue

here than, in fact, actually exists. For example, it is not true, as the Second Circuit asserted, that this Court has "held repeatedly that absent a disruption of government operations, a public employer may not sanction the employee." Six university administrators now face the prospect of a *second* trial, in a case where it has never been clear that their actions violated Jeffries' rights. It is vital that this question be reviewed by this Court.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
July 18, 1994

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 953—August Term, 1993

(Argued: January 21, 1994 Decided: April 18, 1994)

Docket No. 93-7876

LEONARD JEFFRIES,

Plaintiff-Appellee,

—v.—

BERNARD HARLESTON, individually and in his official capacity as president of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Defendants-Appellants,

BLANCHE BERNSTEIN,

Defendant.

Before:

VAN GRAAFEILAND and MCLAUGHLIN, *Circuit Judges*, and BURNS, *District Judge*.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Conboy, *J.*). Following a jury verdict in favor of a controversial professor at City College of New York, the district court found that defendant university officials violated his First Amendment rights by limiting his term as Black Studies department chairman, and that defendants' acts were unprotected by qualified immunity. The district court ordered defendants to reinstate the professor as department chairman, and awarded punitive damages against six defendants.

Held: defendants did violate the professor's First Amendment rights; defendants were not shielded by immunity; and reinstatement was an appropriate remedy. We find inconsistencies in the jury's special verdict responses and we vacate the punitive damage awards and remand for new trial solely on that issue.

AFFIRMED in part, VACATED in part, and REMANDED.

KATHIE ANN WHIPPLE, Deputy Bureau Chief, Office of the Attorney General of the State of New York, (Robert Abrams, Attorney General of the State of New

* Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

York, Jerry Boone, Solicitor General of the State of New York, Clement Colucci, Assistant Attorney General, Roy P. Moskowitz, Assistant General Counsel to the City University of New York, of counsel) *for Defendants-Appellants*.

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MCLAUGHLIN, *Circuit Judge*:

In the summer of 1991, Leonard Jeffries was the Black Studies department chairman at City College of New York ("City College"), and he was the keynote speaker at an off-campus symposium on black culture. He spoke predominantly on the bias he perceived in New York State's public school curriculum. During the speech, Jeffries made several derogatory statements, particularly about Jews. The speech ignited a firestorm of controversy, the upshot being the decision by university officials to reduce

Jeffries' upcoming term as department chairman from three years to one.

Jeffries sued the university officials in the United States District Court for the Southern District of New York (Kenneth C. Conboy, *Judge*), alleging that they reduced his term because of the content of his speech, in violation of the First Amendment. After a jury trial, the district court found six of the 14 defendant officials liable for violating Jeffries' rights. The court reinstated Jeffries as department chair, and awarded him $360,000 in punitive damages.

The defendants appeal, arguing that: (1) they did not abridge Jeffries' free speech rights; (2) they are protected from damage awards by the doctrine of qualified immunity; (3) reinstatement was improper; and (4) the punitive damage awards should be vacated as inconsistent with the jury's special verdict findings.

We hold that defendants violated Jeffries' right to free speech, and that the defendants are not shielded by qualified immunity. We also affirm the reinstatement order because it was an appropriate equitable remedy given the nature of the harm suffered. Because we find that the jury's responses were inconsistent with an award of punitive damages, however, we vacate these awards and remand for new trial on punitive damages.

BACKGROUND

The facts are largely undisputed.

A. *The Parties*

Jeffries is a professor at City College, and the chairman of the Black Studies department there. Bernard Harleston

is the President of City College, which is part of the City University of New York ("CUNY") system. Ann Reynolds is the Chancellor of CUNY. James Murphy is the Chairman of CUNY's Board of Trustees; Edith Everett is Vice-Chair. The remaining defendants are CUNY Trustees.

Jeffries has chaired the Black Studies department since its creation in 1972. The CUNY by-laws state that a chairman's term lasts three years. Jeffries' sixth consecutive term was due to expire June 30, 1991, and on June 5, the Black Studies professors nominated him to another term as chairman.

At CUNY, faculty nominations for department chairs are subject to the approval of the City College President and the CUNY Board of Trustees. Because Jeffries' term was up at the end of June 1991, the Board should have voted on Jeffries at its June meeting. Due to an administrative error, however, the Board did not act on Jeffries' reappointment at that meeting. Despite the absence of formal Board action, Harleston sent Jeffries a letter on July 1 congratulating him on his reappointment. The letter did not mention that the Board had yet to approve his selection.

B. *The Speech*

On July 20, Jeffries delivered his now notorious speech in Albany, at the Empire State Black Arts and Culture Festival. Jeffries was introduced to the audience as the chairman of City College's Black Studies department, and as a former member of a committee organized to review the New York public school curriculum's treatment of minorities. The Festival was not affiliated with CUNY in any way.

Jeffries spoke for more than an hour, primarily criticizing the racial and ethnic biases he perceived in the public school curriculum. During the speech, Jeffries made several comments about Jews that were hateful and repugnant. For example, Jeffries launched several *ad hominem* invectives at specific state and federal officials who supported the curriculum, calling one an "ultimate, supreme, sophisticated, debonair racist," and a "sophisticated, Texas Jew." Jeffries also told his audience that Jews had a history of oppressing blacks. He said that "rich Jews" had financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to "put together a system of destruction of black people" by portraying them negatively in films.

C. *The Aftermath*

Jeffries speech, which was initially broadcast on an Albany television station, received extensive media attention in the New York City area. On August 8, Harleston released a statement condemning Jeffries for undermining CUNY's policy of striving toward racial, ethnic and religious harmony, and indicating that he would "initiate a thorough review of this situation." Reynolds, Murphy, and Everett issued a press release the same day, saying that CUNY would "examine Professor Jeffries' actions and statements and, if warranted, . . . pursue vigorously with City College the remedies that may be appropriate and available. . . ."

Over the next few weeks, Reynolds and Harleston discussed with other CUNY administrators the possibility of removing Jeffries as department chairman. Harleston asked the City College Provost and the Dean of the Social Sciences division to review Jeffries' performance as department chair since July 1 to determine whether the

publicity surrounding the speech hampered his ability to run the department.

One week later, the Social Sciences Dean sent Harleston a memorandum concluding that Jeffries had met his "ordinary administrative responsibilities . . . during an extraordinary period of time." The Dean also cautioned, however, that his review was perfunctory, and that he would submit a follow-up report.

The Provost subsequently reported to Harleston that he had interviewed several people within and without the Black Studies department; according to the Provost, all of those interviewed stated that Jeffries was carrying out his duties adequately. The Provost told Harleston that Jeffries was scheduling courses, running department meetings, recruiting faculty, keeping records, and representing the department at meetings.

Harleston was not satisfied by these two reports on Jeffries' performance. He decided to recommend to the Board of Trustees that they reappoint Jeffries to only a one-year term—instead of the customary three-year term—as department chairman. Reynolds endorsed this planned recommendation. Neither Harleston nor Reynolds investigated whether the Albany speech would impair Jeffries' interaction with Jewish faculty, stigmatize the department or university, or dissuade benefactors from providing financial support.

D. *The Board Meetings*

The Board of Trustees met in late October, with Jeffries' reappointment on the agenda. Harleston recommended that the Board limit Jeffries' term to one year. The Vice-Chancellor for Legal Affairs, an attorney, warned the Trustees that they could not sanction Jeffries

based on the content of his speech. Despite the Vice-Chancellor's admonition, Trustees Edith Everett, Herman Badillo, Blanche Bernstein, and Harold Jacobs voted to reject Jeffries' nomination outright, candidly explaining that their decision rested on the content of his speech. Nine other Trustees voted for Harleston's recommendation, however, and approved a one-year term for Jeffries, to expire at the end of June, 1992. (Trustee Sylvia Bloom abstained from the vote because she had made statements earlier criticizing Jeffries' views.)

Harleston wrote Jeffries of the Board's vote. In his letter, Harleston said that the speech threatened recruitment, fundraising, and CUNY's relationship with the community.

The Provost and Social Sciences Dean made oral follow-up reports to Harleston on Jeffries' performance. They recounted angry exchanges that Jeffries initiated with faculty and administrators regarding his limited term, as well as a bizarre tantrum that Jeffries threw during an interview with a student reporter from Harvard. In December, Harleston decided to replace Jeffries as chairman.

On March 20, 1992, three days before the next Board of Trustees meeting, Harleston announced to the Black Studies department that he planned to recommend that the Board approve Professor Edmund Gordon, retired chairman of Yale University's African-American studies department, to succeed Jeffries in July. Although CUNY by-laws state that the President should confer with the department faculty when choosing a replacement chairman, Harleston had not done so. The faculty opposed Gordon as a candidate, and chastised Harleston for selecting a department chair without consultation.

At the Board meeting, the Trustees voted unanimously to replace Jeffries with Gordon. The defendants gave conflicting testimony about whether, at this meeting, the Trustees discussed Jeffries' performance.

E. *The Proceedings Below*

In June 1992, Jeffries sued Harleston, Reynolds, and the 14 Trustees under 42 U.S.C. § 1983, alleging that he was removed from the department chair in violation of his First Amendment right to free speech. Jeffries sought reinstatement and punitive damages.

At trial, Jeffries introduced a CUNY by-law provision outlining the responsibilities of a department chairman. The by-laws state that the chairman is charged with carrying out the policies of the department, faculty, and Board of Trustees. They list the chairman's duties to include department recordkeeping, assigning courses to department faculty, representing the department at internal CUNY meetings, presiding over department meetings, helping to draft department budget proposals, and evaluating department professors who are up for tenure review.

Jeffries also introduced a summary of the district court opinion in *Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). In *Levin*, another controversial CUNY professor had sued Harleston and other CUNY officials for retaliating against him because of his disparaging off-campus statements about blacks. There, the district court ruled that CUNY had violated the professor's First Amendment rights.

The defendants objected that the *Levin* summary was inadmissible because its probative value was substantially

outweighed by its prejudicial effect. Judge Conboy admitted the summary, however, because it was probative of defendants' knowledge and state of mind when they limited Jeffries' term.

For their part, the defendants offered evidence that Jeffries was an ineffective chairman, and that they would have denied him a three-year term even if he had not given the speech.

To focus the jury's attention on the proper issues, Judge Conboy submitted four specific questions for the jury to answer. The jury returned the following responses:

> 1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department? "YES."
>
> 2. Have the defendants shown by a preponderance of the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech? "NO."
>
> 3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University? "NO."
>
> 4. If the answer to question #3 was no, have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the

Black Studies Department, the College, or the University? "YES."

With this special verdict in hand, Judge Conboy balanced Jeffries' speech interest against the defendants' interest in running CUNY efficiently. He found that the subject of Jeffries' speech—the state public school curriculum—substantially involved a matter of public concern. Judge Conboy then noted that the jury had found that Jeffries' speech did not interfere with CUNY operations. Based on these findings, he concluded that Jeffries' interests were greater, and, accordingly, that the defendants had violated his First Amendment rights.

Judge Conboy then submitted to the jury a second verdict sheet, requiring a specific determination as to each defendant's individual liability. The jury responded that Jeffries had proven by a preponderance of the evidence that six defendants (Harleston, Reynolds, Everett, Badillo, Bloom, and Jacobs) took action against Jeffries because of his speech, and that these defendants would not have limited Jeffries' term had he not given the speech. The jury found that Jeffries had failed to make this showing as to the other defendants, however.[1]

On a third verdict sheet, the jury was asked to determine whether any of the six liable defendants had "acted with malicious intent to violate the plaintiff's rights under the First Amendment . . . or with malicious intent to unlawfully injure him, or . . . with a callous or reckless disregard of the plaintiff's First Amendment rights." If any defendants were found to have such an intent, the jury was required to decide whether, and how much, to award in punitive damages against the culpable parties.

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[1] Bernstein died before trial and was not included in this verdict sheet.

The jury found that all six defendants were liable for punitive damages, apportioned as follows: Harleston—$30,000, Reynolds—$50,000, and Badillo, Bloom, Everett, and Jacobs—$80,000 each. The district judge reduced Harleston's amount to $15,000, and Reynolds' to $25,000.

Jeffries then petitioned the court for a permanent injunction to reinstate him as chairman. The defendants opposed the injunction, and moved to overturn the jury's verdict on the grounds that the evidence was insufficient and that they were shielded by qualified immunity. The defendants also moved that the court vacate the punitive damage awards as inconsistent with the jury's response to question four in the first special verdict.

In a published opinion, Judge Conboy denied the defendants' motion and ordered Jeffries reinstated as department chairman. *See Jeffries v. Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993). He noted that there was substantial evidence that Jeffries' speech motivated the defendants to act, and that defendants had offered little credible evidence that they had limited his term for other legitimate reasons. Judge Conboy also ruled that the defendants were not protected by qualified immunity because, in light of the *Levin* decision, they should have known that they could not retaliate against an employee for speech on matters of public concern.

In addition, Judge Conboy rejected the defendants' argument that the special verdict findings were inconsistent with the punitive damage awards:

> the jury could have reasonably found that while a majority of the defendants had a reasonable expectation that the plaintiff's July 20, 1991 speech would cause hampering of the efficient and effective oper-

> ation of the University, the six defendants found liable did not have this reasonable expectation.

Finally, finding that the balance of equities weighed in Jeffries' favor, Judge Conboy ordered the defendants to reinstate Jeffries as department chairman for two years.

DISCUSSION

On appeal, the defendants argue that the district court erred because: (1) the defendants did not violate Jeffries' First Amendment rights; (2) they were shielded from liability by qualified immunity; (3) reinstatement was improper; and (4) the punitive damage awards were inconsistent with the special verdict findings. We address these arguments in turn.

I. *The First Amendment*

Central to our constitutional democracy is the right to speak on political or social matters without fear of retribution by the government. *See generally Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, *J.*) (freedom of speech is "the indispensable condition of nearly every other form of freedom"). This freedom does not vanish when the views expressed jar majoritarian sensibilities. As Justice Holmes observed 75 years ago:

> [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). More recently, Justice Harlan has added: "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." *Cohen v. California*, 403 U.S. 15, 25 (1971).

This protection against government retaliation for speech extends also to the government's own employees, although the need for an efficiently functioning government must be factored into the balance. *See Rankin v. McPherson*, 483 U.S. 378, 384 (1987). Accordingly, when a public employee expresses an opinion on a matter of social or political concern, even if critical of the very government that employs him, his employer cannot sanction him unless his speech has impaired the efficiency of government operations. *See id.* at 379-80, 383 (data entry clerk in sheriff's office may not be fired for expressing to co-workers her hope that next attempt on President Reagan's life succeeds); *Piesco v. City of New York*, 933 F.2d 1149, 1159-60 (2d Cir. 1991) (city official cannot be fired for publicly criticizing her own department where there is no evidence that her statements actually hampered the department's functioning), *cert. denied*, 112 S.Ct. 331 (1992). *Compare Dambrot v. Central Michigan Univ.*, 839 F.Supp. 477, 487 (E.D. Mich. Nov. 23, 1993) (university could fire coach for racial remarks to players in locker room during halftime pep talk because the players' poor performance was "not the kind of question that is fairly cast as a 'public' issue").

To determine whether the government violated an employee's free speech rights, the employee's interest in speaking on matters of public concern must be balanced against the government's interest in rendering public services efficiently. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). We review *de novo* the district court's bal-

ancing of interests. *See Connick v. Myers*, 461 U.S. 138, 150 n.10 (1983).

To establish a *prima facie* case that the government fired an employee in violation of his free speech rights, the employee must demonstrate that the speech: (1) involved a matter of public concern; and (2) was a substantial or motivating factor in the government's decision to fire him. *See Frank v. Relin*, 1 F.3d 1317, 1328-29 (2d Cir.), *cert. denied*, 114 S.Ct. 604 (1993). The former is a question of law; the latter, of fact. *Id.* at 1329.

Jeffries' speech unquestionably involved public issues. The speech criticized the public school curriculum (and its supporters) for reflecting bias against minorities, and discussed the history of black oppression. These issues are suffused with social and political hues. True, the tenor of Jeffries' speech was less than ingratiating, and, as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it. But First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("[S]o long as the means are peaceful, the communication need not meet standards of acceptability.").

Jeffries also satisfied the second *Pickering* prong. The evidence substantially supported the jury's finding that defendants' decision to remove Jeffries was motivated by the content of the Albany speech. Before the speech, Harleston was eager to send premature congratulations to Jeffries on his reappointment. After the speech, Harleston asked two administrators to determine whether Jeffries was performing his duties as chairman adequately. Even though both reported favorably on Jeffries' performance,

Harleston proceeded to recommend that the Board reappoint Jeffries for only a one-year term.

Then, the Board, with no evidence that Jeffries' performance was deficient or that the speech threatened to harm CUNY, voted to limit Jeffries' term. Four Trustees voted against reappointment outright, candidly conceding that they did so because of the content of Jeffries' speech. Likewise, at the next Board meeting, where the Board approved Gordon as the new department chairman, several Trustees admitted at trial that Jeffries' performance was not discussed at all.

The jury, therefore, had ample basis to find that the speech was the impetus for the defendants' action. Thus, Jeffries' speech was a substantial or motivating factor behind the vote to limit his term, and Jeffries has made out a *prima facie* case.

Even though the employee makes out a *prima facie* case that the defendants sanctioned him for his speech, the defendants may still escape liability by showing either that: (1) they would have fired the employee regardless of the speech; or (2) the employee's conduct interfered with the "effective and efficient fulfillment of [defendants'] responsibilities to the public." *Frank*, 1 F.3d at 1329 (quoting *Connick*, 461 U.S. at 150).

Having carefully reviewed the record, we agree with the district court that the jury could reasonably have concluded that the defendants would not have removed Jeffries but for the speech. It was only after the speech that Harleston began expressing concerns about Jeffries' performance; not three weeks before, he had congratulated Jeffries on his reappointment. While the defendants offered evidence that Jeffries had exchanged heated words with other CUNY personnel regarding CUNY's reaction

to his speech and had berated a student reporter from Harvard, there was no evidence that these incidents were ever considered by the Board as a reason to deny reappointment. The record shows that the Trustees did not remove Jeffries for any reason other than his speech.

Nor have the defendants shown that Jeffries' speech interfered with CUNY's operation. *See Frank*, 1 F.3d at 1329. Generally, interference in this context entails impairing employer discipline, causing disharmony among co-workers, disrupting close working relationships where loyalty and confidence are essential, failing to perform one's duties, or frustrating the regular operation of the government enterprise in question. *See Pickering*, 391 U.S. at 570-73.

How much interference the government must show to justify sanctioning an employee for his speech will vary, depending on the degree that the speech involved matters of public concern. *See Connick*, 461 U.S. at 146-47. If the speech only tangentially touched on public issues, the government need not wait until "the disruption of the office and the destruction of working relationships is manifest" before taking action. *Id.*, 461 U.S. at 152. If, alternatively, the speech substantially addressed public issues, the government must show the statements "actually undermined the effective and efficient operation" of the employee's department. *Piesco*, 933 F.2d at 1159. Because, as we held above, Jeffries' speech substantially concerned public issues, the defendants shoulder the weightier burden of showing that the speech caused substantial disruption at CUNY.

Endeavoring to lighten their burden, the defendants argue that they need only demonstrate a reasonable expectation that Jeffries' speech would eventually cause dis-

ruption because Jeffries held a highly visible, policy-making position. True, the government generally has more discretion to sanction an employee who serves in a "confidential, policymaking, or public contact role" than one who performs ministerial functions, *Rankin*, 483 U.S. at 390-91 (1987) (the employee's responsibilities determine whether his statement "somehow undermines the mission of the public employer"); *Piesco*, 933 F.2d at 1157 (a high-ranking public official must act with caution when commenting on matters integral to that person's official responsibilities); *Hall v. Ford*, 856 F.2d 255, 261 (D.C. Cir. 1988) (government's burden of proving interference is less stringent when the employee holds a position for which loyalty is essential). The defendants, however, have not shown how Jeffries, by virtue of his position as department chair, could undermine CUNY's mission with his speech. *See Rankin*, 483 U.S. at 390. The CUNY by-laws charge the department chairman with carrying out the policies of the department, faculty, and Board of Trustees. They do not vest him with the power to make policy. Further, the department chairman performs an essentially ministerial role: He keeps department records, assigns courses to teachers, represents the department at internal CUNY meetings, drafts department budget proposals, leads departmental meetings, and makes departmental tenure evaluations.

In addition, the evidence suggests that, within CUNY, department chairs are perceived as ministerial positions. When Harleston asked the Provost to evaluate Jeffries' performance, the Provost focused solely on whether Jeffries had completed the ministerial tasks listed in the by-laws. He did not examine Jeffries' interpretations of CUNY policy, his contact with the public, or the like. Nor did the defendants introduce any other evidence at trial to

show that department chairmen have special duties of loyalty or confidentiality, or that they have more public contact than an ordinary professor. While a department chair may be a position of prestige, it does not call for the level of institutional fidelity that would justify the lesser interference burden.

In short, to rebut Jeffries' *prima facie* case, the defendants must show substantial interference. We find that the defendants have provided meager evidence at best that Jeffries' speech had any real disruptive effect on CUNY operations, and thus, have fallen short of their burden.

Finally, the defendants argue that Jeffries failed to show that they caused his deprivation, as required by section 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978). The defendants reason that: (1) only four of the 13 voting Trustee defendants were found liable for retaliating against Jeffries because of his speech (Harleston and Reynolds were not Trustees); (2) these four could not have caused Jeffries' deprivation because the other nine Trustees voted to limit Jeffries' term for constitutionally permissible reasons. We disagree.

A plaintiff may establish causation under section 1983 if he shows that the defendants participated in, or were "moving forces" behind, the deprivation. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 819-20 (1985); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-61 (1st Cir. 1989) (causation includes participating in an affirmative act, or "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.").

Under this standard, all six defendants found liable have "caused" Jeffries' deprivation. Defendants Harleston and Reynolds, while not Trustees, appear, nevertheless, to

have been prime movers behind CUNY's effort to take action against Jeffries; Harleston himself was singularly responsible for proposing that the Board of Trustees approve Jeffries for only a one-year term. Thus, they were "moving forces" behind the vote. In addition, by voting at another meeting to replace Jeffries with Gordon, Trustees Badillo, Bloom, Everett and Jacobs participated in the act (voting) that caused Jeffries' deprivation (removal from the department chair).

Accordingly, we affirm the district court's finding that the defendants violated Jeffries' First Amendment rights.

II. *Qualified Immunity*

The defendants contend that even if they did violate Jeffries' rights, the damage awards should be vacated because the defendants, as government officials, enjoy qualified immunity.

The doctrine of qualified immunity balances society's need to allow public officials to discharge their duties without fear of litigation against the individual's interest in being safe from official abuse. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 813-15 (1982); *Zinker v. Doty*, 907 F.2d 357, 359 (2d Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991). Thus, qualified immunity shields state actors from liability for their official acts unless they violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1063-64 (2d Cir.), *cert. denied*, 114 S.Ct. 185 (1993).

A right is "clearly established" if it meets one of three tests: (1) it is defined with reasonable clarity; or (2) the Supreme Court or this Circuit has affirmed its existence;

or (3) a reasonable defendant would understand from existing law that his acts were unlawful. *White Plains Towing*, 991 F.2d at 1064. *See generally Malley v. Briggs*, 475 U.S. 335, 341 (1986) (the doctrine does not shield "the plainly incompetent or those who knowingly violate the law").

The defendants should have known from existing law that they could not remove Jeffries from the department chair on the basis of his speech. By July 20, 1991, both the Supreme Court and the Second Circuit had held repeatedly that, absent a disruption of government operations, a public employer may not sanction an employee for speaking on issues of social or political concern. *See, e.g., Rankin*, 483 U.S. at 379-80, 383 (1987) (clerk in sheriff's office wrongfully fired for saying that she hoped next assassination attempt on President Reagan was successful); *Pickering*, 391 U.S. at 574 (teacher could not be fired for publicly criticizing school's athletic budget or for questioning character of school administrators); *Piesco*, 933 F.2d at 1159-60 (high-ranking city administrator wrongfully fired for telling a legislative committee that a "moron" could pass the police entrance exam) (decided June 3, 1991); *Dube v. State Univ. of New York*, 900 F.2d 587, 598 (2d Cir. 1990) (it is "objectively unreasonable" for university administrators to retaliate against professor solely because of his public speech).

In the face of this overwhelming precedent, the defendants argue that the right was not clearly established because no court had specifically addressed whether a public university might limit a department chairman's term on the basis of his speech. The defendants, in effect, believe they can act as they choose until there is a case on all fours. We reject such jural insouciance. The defendants should have known their actions were illegal from the

decisions reproving closely analogous conduct. *See Selzer v. Fleisher*, 629 F.2d 809, 812 (2d Cir. 1980) ("A prior judicial decision holding conduct such as appellants' to be a basis for suit was not necessary to apprise them of a rule which should come as no surprise . . . ."), *cert. denied*, 451 U.S. 970 (1981). *See also Vasbinder v. Ambach*, 926 F.2d 1333, 1341 (2d Cir. 1991). Indeed, two of those decisions, *Pickering* and *Dube*, specifically involved public school teachers.

This abundance of precedent alone would justify our rejection of defendants' qualified immunity defense. Here, however, the defendants had further notice that their actions were illegal. One month before the first Board meeting, Harleston and other CUNY officials lost a lawsuit in which a professor claimed that CUNY stigmatized him on the basis of statements he made outside the classroom. *See Levin v. Harleston*, 770 F.Supp. 895 (S.D.N.Y. September 4, 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). The *Levin* district court opinion was a clarion call to the defendants that sanctioning Jeffries for his speech was unconstitutional.[2]

Finally, we note that the Trustees were advised at the first Board meeting by CUNY's own Vice Chancellor of Legal Affairs that they could not act against Jeffries based on his speech.

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[2] The defendants argue that the district court improperly allowed the jury to see a summary of the district court's opinion in *Levin* because it suggested to the jury that the defendants had a propensity to commit first amendment violations.

While evidence of prior bad acts may not be admitted to show propensity, it may come in for other purposes, such as to show state of mind. Fed. R. Evid. 404(b). Here, the summary of the *Levin* opinion was highly probative to show that the defendants knew that they were not allowed to punish faculty members for extracurricular expression. The *Levin* summary was relevant on the issues of liability and punitive damages, and thus was properly admitted.

For these reasons, we hold that the defendants were not shielded by qualified immunity.

III. *Reinstatement*

The defendants also argue that the district court should not have ordered them to reinstate Jeffries as department chairman. Essentially, their position is that the injunction would have unduly harsh public consequences because Gordon, the replacement chosen by the Board, is a more effective department chairman.

An injunction is proper when the plaintiff has suffered a constitutional violation that causes continuing irreparable injury for which the law provides no adequate remedy. *See New York State Nat'l Org'n for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990). In determining whether to issue an injunction, the court should balance the relative injuries to the parties and should consider the public consequences. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

We find that reinstatement was well within the district court's discretion. The defendants violated Jeffries' right to free speech by limiting his term as department chairman. And, as the district court noted, the department chair is a position of prestige, both inside and outside CUNY. Unremedied, the violation constitutes a continuing loss of that prestige, further aggravated by the cloak of disgrace that surrounded Jeffries' removal. Further, he has no remedy at law for this injury. *See Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) ("[I]rreparable injury means injury for which a monetary award cannot be adequate compensation. . .").

On balance, we find that Jeffries' injury outweighs any detriment to the public from having Jeffries as department

chairman for two more years. We affirm the reinstatement order.

IV. *Punitive Damages*

Punitive damages may be awarded for a constitutional violation where the defendant's conduct was driven "by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). They are imposed to "punish the person doing the wrongful act and to discourage him and others from similar conduct in the future." *Restatement (Second) on Torts* § 908 cmt. a (1979). Accordingly, punitive damages should be reserved for a case where the defendant acted with a degree of malice akin to the *mens rea* required for most crimes. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). *See also* William L. Prosser, *Handbook of the Law of Torts* 9 (4th ed. 1971).

The defendants argue that we should vacate the punitive damage awards against Harleston, Reynolds, Everett, Badillo, Bloom and Jacobs because they are inconsistent with an earlier jury finding. Specifically, they note that, in response to question four on the first special verdict form, the jury found that the defendants were motivated in their actions by a "reasonable expectation" that Jeffries' speech would disrupt the effective and efficient operation of CUNY. The defendants regard this finding as inconsistent with the jury's subsequent finding that six of the defendants acted with malicious intent or reckless indifference. We agree.

The Seventh Amendment's right to trial by jury will not tolerate a judgment based on a material inconsistency in the jury's verdict. *Finnegan v. Fountain*, 915 F.2d 817,

820 (2d Cir. 1990). On the other hand, respect for the right to trial by jury counsels that in reviewing a jury's special verdict responses, we prefer a reading that reconciles apparent inconsistencies. *See Brooks v. Brattleboro Mem. Hosp.*, 958 F.2d 525, 529 (2d Cir. 1992). Where we cannot harmonize the jury's responses rationally, however, the Seventh Amendment requires that we vacate the judgment and order a new trial. *See id.* at 529-30; *Finnegan*, 915 F.2d at 820; *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988); *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662 (2d Cir. 1975).

In *Finnegan*, for example, the plaintiff sued a police officer under section 1983 for using excessive force when arresting her. The jury was given two special verdict sheets. On the first, it found that the officer acted in the good faith belief that he was using reasonable force; on the second, the jury found he acted maliciously, wantonly, and oppressively. *Finnegan* held that these verdicts flatly contradicted each other, and, accordingly, that the judgment could not stand. *Id.* at 821. *See Bates v. Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984) (jury finding that officer did not know actions were illegal contradicts finding that his actions were shocking, callous, and brutal).

We believe the jury responses here, like those in *Finnegan*, are hopelessly irreconcilable. The defendants could not have acted with a reasonable expectation that Jeffries' speech would harm CUNY, and also with malice or reckless indifference. If defendants' actions were motivated by a reasonable expectation of harm to CUNY, the court could not award punitive damages; if they acted maliciously or with reckless indifference, such awards would be proper. *See Restatement (Second) on Torts* § 908 cmt. b ("[P]unitive damages may be awarded because of

. . . wrongful purpose or intent. . . . Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like. . . .").

The district court—understandably, given the time and resources it had invested in this prickly litigation—sought to harmonize the jury's responses by interpreting the first response to mean only that "a majority of the defendants" reasonably expected the speech would harm CUNY, and the second response to declare which defendants did *not* act with such a reasonable expectation. We find this interpretation more ingenious than ingenuous. There is no fair way to read the first verdict response so narrowly. There is a threshold of clarity that a jury verdict should cross, particularly when it awards punitive damages based on a finding of malice or recklessness. The legal and moral consequences of such a finding are too serious to leave the finding to conjecture and surmise.

Accordingly, we vacate the punitive damage awards against Harleston, Reynolds, Everett, Badillo, Bloom, and Jacobs, and remand for a new trial to decide whether Jeffries should recover punitive damages from these six defendants.

CONCLUSION

In sum: We affirm the district court's holding that the defendants violated Jeffries' First Amendment rights; we affirm that defendants were not shielded by qualified immunity; and we affirm the order reinstating Jeffries to his department chair for two years; however, we vacate the award of punitive damages and remand for a new trial solely on that issue.

AFFIRMED in part, VACATED in part, and REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 Civ. 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

—v.—

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Defendants.

OPINION AND ORDER

KENNETH CONBOY, *District Judge*:

A federal jury has found that City University, without justification, punished a tenured professor on its faculty for an off-campus speech he had given, by removing him as Chairman of his academic department. It is unequivocally clear, under our Constitution, and the law enunciated on the subject by the United States Supreme Court, and in the light of the factual trial record developed in this case, that the action taken by the University was constitutionally imper-

missible. This is and must be the case, in spite of the hateful, poisonous and reprehensible statements made by the professor in the speech in question. This need not have been the case if the University had offered convincing, firsthand proof at trial that either the consequences of the speech disrupted the campus, classes, administration, fund-raising or faculty relations, or that the professor had turned his classroom into a forum for bizarre, shallow, racist and incompetent pseudo-thinking and pseudo-teaching. While a few shards of hearsay or self-serving evidence were offered halfheartedly by the University to suggest potentially viable defenses along these lines, the University cannot escape the astonishing picture it painted for the jury: high public and academic officials swearing under oath that they had removed the professor for tardiness in arriving at class and sending in his grades, and for asserted brutish behavior which had been either ignored or condoned by the University.

We are, accordingly, required to uphold the jury verdict on the professor's first amendment claim, and the related punitive damage award made by the jury in justifiable disgust with the conduct of the University officials who did not act, then acted for the wrong reason, then were dishonest about their motivations in testimony before the jury.

We are asked by the defendants not to reinstate the professor in the Chairmanship even if we uphold his first amendment claim and the punitive damages associated with it. We are told that the professor has lost nothing and hence is not irreparably harmed in his dismissal, that the award of punitive damages is an adequate measure of his injury, and that the balance of equities lies in the University's favor. If the Chairmanship meant nothing, why did the University go to such lengths in the trial to justify its denial as a proper and just sanction for a cavalcade of the professor's non-speech sins? If it meant nothing, why was it bestowed upon, and indeed accepted by one of the most eminent Black Studies scholars in America, Edmund Gordon? The punitive damages were not, of course, a measure of the professor's injury but a

measure of the bad faith of the defendants. In any case, to forego reinstatement in light of the punitive damage award, ironically to be paid in this case not out of the pockets of the defendants but out of the public treasury, would put a price tag on constitutional violations and we must not, and will not, denigrate the first amendment by doing so. Accordingly, the Court will reinstate Professor Jeffries as Chairman of the Black Studies Department for a period of two years.

As for the balance of equities, the short answer is that had the University adequately established that the professor, whose teaching has after all been tolerated for twenty years, conducts his classes or his Chairmanship in a racist, anti-semitic or incompetent manner, we would not order him to be reinstated. The confused and incompetent defense record regrettably leaves us no choice but to order the reinstatement of plaintiff.

We will, however, word the permanent injunction to make it unmistakably clear that the University is in no way restricted from monitoring the Professor's classes and his on-campus stewardship of the Chairmanship, and that he may be removed from either if a good cause basis for abusive or indecent behavior is adequately established. We observe, with reluctance but out of necessity, that if the University decides to pursue such a course, it ought to concern itself with such matters as witnesses, stenographic records, affidavits and the like, and not rely on pious press releases and hearsay-ridden, elliptical, hand-wringing memoranda from academic deans.

With respect to the professor's second claim, based upon an asserted property interest under the fourteenth amendment, we agree with the defendants that the record is insufficient and, accordingly, set aside the jury's verdict. We will proportionally reduce the damage award.

Finally, we conclude that the defense of qualified immunity is not available to the defendants, in that they violated clearly established statutory or constitutional rights of which a reasonable person would have known, and in that it was not objectively reasonable for the defendants to believe that their

acts did not violate authority from the United States Supreme Court, and the Courts of this Circuit.

The reasons and legal basis for all of the above findings follow.

Background

The relevant history of the case begins on June 5, 1991, with the unanimous reelection of Professor Jeffries as Chairman of the Black Studies Department by the faculty of the Department. *See* Trial Transcript ("Trial Tr.") 55, 185.[1] On July 1, 1991, President Harleston sent a letter of congratulations to Professor Jeffries accepting plaintiff's election without reservation. *See* Letter from President Harleston to Professor Jeffries, dated July 1, 1991 ("I look forward to working with you and your department . . . . I am confident that with your assistance and guidance and with the help of your Executive Committee, we will continue to serve the students and citizens of the City College as an educational institution of the highest quality." *Id.*).

Three weeks later, on July 20, 1991, Professor Jeffries made a speech at the Empire State Black Arts and Cultural Festival. *See* Plaintiff's Exhibit 3 (providing text of speech). The broad subject of the speech was the reform of the educational system to reflect diverse, and particularly minority, perspectives. It was given in response to wide criticism leveled against Professor Jeffries by some of those he attacked in his speech. Furthermore, he was speaking as an appointed consultant of the State Education Commissioner. In the speech, Professor Jeffries made strident attacks against particular individuals, and made derogatory comments about specific ethnic groups. *See Id.*

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[1] Professor Jeffries was elected Chair of the Black Studies Department every three years during the period from September of 1972 until July 1, 1992, when Professor Edmund Gordon, formerly Chair of the African American Department at Yale University, took over. *See* Trial Tr. 50, 52-54.

The speech caused an outcry of protest and was condemned both within and without the University. On August 8, 1991, President Harleston wrote a letter to his City College colleagues attacking Professor Jeffries' speech as containing "clear statements of bigotry and anti-semitism." *See* Plaintiff's Exhibit 5, Letter from President Harleston to City College Colleagues, dated August 8, 1991.[2] In the letter, President Harleston hinted at the possibility of action being taken against Professor Jeffries in response to the speech:

> Certainly, we must insure the right of our faculty and students to express their ideas, both in and outside the classroom, without fear of institutional censorship. However, the right to free expression and, indeed, to academic freedom is not and cannot be absolute. With freedom must come accountability.
>
> I therefore, would like to reassure you that at the beginning of the Fall semester, I will initiate a thorough review of this situation. This review will be conducted in consultation with faculty and staff, and will follow a procedure that respects the principles of academic freedom and assures due process.

Id.

A Memorandum from Vice Chancellor Ira Bloom to Chancellor W. Ann Reynolds, on the same day as the Harleston letter, suggested possible actions that might be taken against Professor Jeffries, including the removal of the

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[2] *See also* Plaintiff's Exhibit 14, Memorandum from Professor Morris Silver, Chairman of the Economics Department, to Provost Pfeffer, dated Sept. 26, 1991 ("Speaking as a Department Chairman and member to the Social Science P&B since 1969, it is my considered judgment that the ethnic slurs uttered by Professor Jeffries in this public forum represent gross deviations from proper professional discourse. The breaches of professional conduct comitted by Professor Jeffries are so very serious that he has thereby disqualified himself from carrying out the duties and responsibilities of academic leader of the Black Studies Department, as defined by the CUNY Bylaws." *Id.*).

plaintiff from his position as Chairman of the Black Studies Department. *See* Plaintiff's Exhibit 6, Memorandum from Vice Chancellor Ira Bloom to Chancellor W. Ann Reynolds, dated August 8, 1991 ("The following procedures would be applicable if consideration were to be given to removal as department chair or to disciplinary action . . . ." *Id.*). The possible actions were further discussed in a letter from Provost Robert Pfeffer to President Harleston on August 14, 1991, which also refers to the possibility of removing the plaintiff from his position as Chairman of the Black Studies Department. *See* Plaintiff's Exhibit 7, Letter from Provost Pfeffer to President Harleston, dated August 14, 1991 ("Professor de Jongh has already viewed the video-tape and does not think Jeffries' remarks were so outrageous as to be sufficient cause for his removal as department chair. It is agreed [by and among whom is not clear] that the most severe censure of Professor Jeffries should be limited to removing him as the Chair of the Black Studies Department." *Id.* at 1).

On September 12, 1991, President Harleston wrote to Provost Pfeffer requesting that Pfeffer "undertake a review of Dr. Leonard Jeffries' leadership of the Black Studies Department to determine whether Dr. Jeffries can continue to act effectively as departmental administrator and as a participant in the formation, development, and interpretation of college-wide interests and policy." Plaintiff's Exhibit 9, Letter from President Harleston to Provost Pfeffer, dated September 12, 1991.[3] On September 17, 1991, President Harleston wrote to "Alumni and Friends of City College" to explain the actions he had taken since the July 20th speech,

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[3] President Harleston elaborated on Provost Pfeffer's assignment:

> "While the focus of this review is whether Dr. Jeffries can now provide effective leadership as Chair of the Black Studies Department in light of the impact his public statements have had, if any, upon the present operations of the College, and his department, the ideas he has expressed, including the speech he recently delivered in Albany, are not germane to this review."

Id.

specifically with respect to the review being conducted by Provost Pfeffer. *See* Plaintiff's Exhibit 11, Letter from President Harleston to "Alumni and Friends of City College," dated September 17, 1991.[4]

In response to an unwritten request from Provost Pfeffer and President Harleston, Jeffrey Rosen, Dean of the Division of Social Sciences, wrote a memorandum on September 19, 1991, only one week after President Harleston's directive to Provost Pfeffer, which preliminarily evaluated the "recent performance" of Professor Jeffries as Chairman of the Black Studies Department. *See* Plaintiff's Exhibit 12, Memorandum from Dean Rosen to Provost Pfeffer, dated September 19, 1991; Trial Tr. 193. Dean Rosen's report, described as an "initial assessment," found that Professor Jeffries was fulfilling his duties adequately as Chairman of the Black Studies Department.[5] This document of two pages makes it clear that the Dean's investigation consisted solely of his personal "observations" of Professor Jeffries' "discharge of ordinary administrative responsibilities" as Chair of the Black Studies Department. In a follow-up report of only three paragraphs, two weeks later, Dean Rosen again failed to find fault with Professor Jeffries' performance as Chair. Indeed, he described his interactions with Professor Jeffries as "productive" and "collegial." *See* Plaintiff's Exhibit 15, Memorandum from Dean Rosen to Provost Pfeffer, dated October 2, 1991.

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[4] *See Id.* ("The remarks [in the July 20th speech] . . . have deeply hurt and offended members of these groups and threaten to undermine the very fabric of collegial life . . . . the sense of outrage felt by many has led to calls for actions of every variety, including swift and vengeful punishment. Some of these demands have been withdrawn or modified with the passage of time. Academic procedure and the Bylaws of the University do not authorize us to act out of hurt or vengefulness or by way of reprisal. It is a right, however, to deliberate with our peers and according to our Bylaws on actions that may be appropriate to the issues involved.

Accordingly, I have asked the Provost to undertake an administrative review as to whether the Chair of the Black Studies Department can carry out the duties and responsibilities as Chair, as defined by the Bylaws of The City University of New York." *Id.* at 1).

On October 4, 1991, Provost Pfeffer came out with his review of Professor Jeffries' performance. *See* Plaintiff's Exhibit 16, Pfeffer "Administrative Review of Leonard Jeffries Jr.", dated Oct. 4, 1991. The review covered "Professor Jeffries' performance as Chairperson from July 1, 1991 (the commencement of his newly elected term as chair) through the present." *Id.* at 3. In the review, Provost Pfeffer found that Professor Jeffries' performance had not suffered as a result of the speech or the publicity surrounding it: ". . . Professor Jeffries appears to be functioning this semester as least as efficiently as over the last 10 years, and probably more so." *Id.* at 3. Pfeffer concluded his review:

> . . . my review of Professor Jeffries' leadership of the Black Studies Department since July 1, 1991, indicates that he is fulfilling the duties of a chair as written in Article 9.3 of the CUNY Bylaws. Evidence gathered from the Dean, the Social Science P&B, and the Black Studies Department indicates that Professor Jeffries has been responsibly performing those duties delineated, including scheduling courses, presiding over departmental meetings, recruiting faculty, keeping departmental records, representing the department at the P&B, and Faculty Council, etc."

Id. at 5.

The incomplete nature of Provost Pfeffer's "review" and Dean Rosen's "investigation" is plainly apparent in the Provost's reference in his report to conversations with Professor Morris Silver and other faculty members regarding Professor Jeffries' speech, and the consequences following upon the speech. Bearing in mind that President Harleston's charge had imprecisely attempted to define his task as deter-

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[5] *See Id.* ("In summary then, the ordinary administrative responsibilities of a department Chair have been met during an extraordinary period in time. Nonetheless, the time span covered by this report is both too brief and, in many respects, too atypical to support any broad generalizations. I will therefore submit a follow-up report . . . ." *Id.*).

mining whether Professor Jeffries' leadership as a college chairman had been compromised as a result of his speech, and whether the College had been injured by the impact of the speech, the Provost should have broadened his focus and done a more systematic analysis of Professor Jeffries' performance. For example, Provost Pfeffer could have addressed three critical areas that he instead chose to ignore in his review: whether Professor Jeffries could effectively interact as Chairman with faculty members, and specifically, Jewish faculty members, whether the racist and bigoted nature of Professor Jeffries' remarks would stigmatize and isolate the Black Studies Department, and make it a parochial backwater of the College, and whether the College's alumni would withdraw their financial support in light of the professional embarrassment Professor Jeffries represented as a formal leader of the College administration.

Such a vital inquiry was never made, either through ignorance or cowardice. This fundamental flaw in the University's response to the Jeffries' controversy doomed its position in federal court, when the inevitable lawsuit was filed.

It is apparent that the Provost's report is predicated on nothing more than the aforementioned two communications he had from Dean Rosen and single meetings with the faculty of the Black Studies Department, which broadly supported Professor Jeffries, and the Social Sciences Department P&B Committee, whose members said that Professor Jeffries continued to carry out his duties as before.

Despite the positive review of the Provost, the Board of Trustees, upon the recommendation of President Harleston, voted on October 28, 1991, to limit Professor Jeffries' appointment as Chair to one year rather than the customary three-year term. *See* Plaintiff's Exhibit 18, Minutes of the Meeting of the Board of Trustees of the City University of New York, October 28, 1991.[6] There is no documentary evi-

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[6] *See also* Plaintiff's Exhibit 21, Letter from W. Ann Reynolds to Frederick D. Schmidt of the New York State Assembly, dated November 4, 1991.

dence as to what motivated this decision of the Board. The next day, President Harleston wrote to Professor Jeffries informing him that Harleston had recommended to the Chancellor and the Board of Trustees that Professor Jeffries be given only a one-year term. *See* Plaintiff's Exhibit 19, Letter from President Harleston to Professor Jeffries, dated October 29, 1991. Amazingly, President Harleston expressed concerns in this letter about the impact of Professor Jeffries' conduct upon "faculty and staff recruitment, alumni fund-raising and [the College's] relationship with the business, Government and academic communities," without having required any formal investigation into such matters.

During this period, the months of October and November, Professor Jeffries was involved in four incidents that raised concern within the administration of the University.[7] The first incident occurred on October 18, 1991, when Elliot Morgan, a student reporter from the *Harvard Crimson*, visited the plaintiff on the City College campus to conduct an interview. *See* Trial Tr. 1308-34; Defendants' Exhibit R, Memorandum from Robert E. Diaz to Chancellor Reynolds, dated November 6, 1991. During the course of the interview, which was conducted with a tape recorder in plain view, plaintiff made disparaging remarks about other scholars in the field of African-American Studies as well as homosexuals.[8] *See* Trial Tr. 1318-21. During the course of the interview, Professor Jeffries threatened to "kill" Morgan if the content of the inter-

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[7] *See* "Memorandum of Law in Support of Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, and in Opposition to Plaintiff's Request for Injunctive Relief," June 16, 1993, at 52-56 (describing four incidents).

[8] Professor Jeffries called Henry Louis Gates, Chair of the African-American Studies Department at Harvard University, "a faggot and a punk." *See* Trial Tr. 1318 (Elliot Morgan testimony). In addition, Professor Jeffries stated that homosexuality was not "natural" for blacks and was "an ice element thing." *See* Trial Tr. 1320 (Elliot Morgan testimony). Professor Jeffries further asserted that when he was in Europe, European men used to offer their wives to him in exchange for gay sex. *Id.*

view ever became public. *See* Trial Tr. 1321. At the end of the interview, plaintiff had Mr. Morgan's tapes of the interview confiscated. The tapes were never returned. *See* Trial Tr. 1322-26.

The second incident occurred at the end of October, when Professor Jeffries learned from a student that "Professor Silver said that they were going to start an investigation of the Black Studies Department. . . ." Trial Tr. 388. *See* Defendants' Exhibit C. In response, Professor Jeffries wrote to Dean Rosen, declaring "war" on the faculty. *See* Defendants' Exhibit C, Memorandum from Professor Jeffries to Dean Rosen ("I am sending a notice officially to him, you, the Provost and the President that if this faculty wants war it will get it—enough is enough. We will fight fire with fire." *Id.*). In addition, on October 31, 1991, Professor Jeffries went to an Economics student-faculty luncheon and exchanged "intense words" with Professor Morris Silver. *See* Trial Tr. 388.[9] We note, however, that Professor Silver did not file a formal complaint, that there was no formal proceeding initiated against Professor Jeffries as a result of the incident, (*See* Trial Tr. 389), and that Professor Silver was not called as a witness for the University at the trial.

The third incident occurred on November 12, 1991, during a meeting with Professor Jeffries, Provost Pfeffer and Dean Rosen. At the meeting, Provost Pfeffer and Dean Rosen urged plaintiff to voluntarily step down as Chairman of the Black Studies Department. *See* Trial Tr. 218-19. In response, Professor Jeffries became angry and threatened to turn City College into "Crown Heights." *See* Trial Tr. 223 (Rosen's version), 315 (Jeffries' version), 812 (Pfeffer's version); Plaintiff's Exhibit 22, Memorandum from Provost Pfeffer and

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[9] Professor Jeffries claims that the secretary went into the luncheon and Professor Silver came out to talk with Jeffries. *See* Trial Tr. 458. In his letter, Professor Silver suggests that Professor Jeffries actually entered and disturbed the luncheon in progress. *See* Defendants' Exhibit D, Letter from Morris Silver, Chair of the Department of Economics, to Dean Rosen, dated October 31, 1991.

Dean Rosen to President Harleston, dated November 18, 1991.

The final incident occurred on November 15, 1991, when Professor Jeffries confronted President Harleston in the lobby of the administration building, as Harleston was trying to leave for an appointment. *See* Trial Tr. 474-79 (Jeffries version), 989-91 (Harleston version). Angry over negative comments President Harleston had made on television the previous day about Professor Jeffries, the plaintiff confronted President Harleston and upbraided him in an angry and hostile manner.

During the period of these incidents, the CUNY administration was continuing to review the performance of Professor Jeffries as Chair of the Black Studies Department. From the time of the Pfeffer report, on October 4, 1991 until the Spring of 1992, Provost Pfeffer and Dean Rosen, at the direction of President Harleston, periodically reviewed the performance of Professor Jeffries as Chair. *See* Trial Tr. 771, 846, 983-85. These reviews were not written down, but were passed on orally to President Harleston during meetings. *See* Trial Tr. 845.[10] The reviews apparently became increasingly negative (*See* Trial Tr. 985), and in December of 1991, President Harleston, Provost Pfeffer, and Dean Rosen came to an agreement that Professor Jeffries should be replaced as Chairman. *See* Trial Tr. 541, 898, 991. Astonishingly, there is no written record or document of any kind that memorializes this important decision on the part of the CUNY administration, or the reasons for it.

On March 20, 1992, President Harleston and Provost Pfeffer met with the faculty of the Black Studies Department

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[10] During the period between October 4, 1991 and May 22, 1992, Provost Pfeffer and Dean Rosen did write one memorandum to President Harleston with respect to Professor Jeffries. *See* Plaintiff's Exhibit 22, Memorandum from Provost Pfeffer and Dean Rosen to President Harleston, dated November 18, 1991. However, the purpose of this memorandum appears to be more a description of a particular incident than a review of Professor Jeffries' performance as Chair of the Black Studies Department. *See Id.*

to "advise" them of President Harleston's decision to recommend to the Board of Trustees that Professor Edmund Gordon be named as the new Chairperson of the Department. *See* Trial Tr. 1002-03. In this meeting, President Harleston also sought to get "input" from the Black Studies faculty with respect to his recommendation to appoint Professor Gordon. *See Id.*

The reaction of the Department to President Harleston's recommendation was extremely negative. *See* Trial Tr. 322-23, 1003. The same day as the meeting, the Black Studies Department Executive Committee and full-time faculty sent a memorandum to President Harleston protesting the actions of the Board of Trustees to limit Professor Jeffries' term as Chairman of the Black Studies Department without consulting the Department. *See* Plaintiff's Exhibit 24, Memorandum from the Black Studies Department Executive Committee and full-time faculty to President Harleston, dated March 20, 1992.[11]

On March 23, 1992, the Board of Trustees voted to appoint Professor Gordon as the new Chair upon the expiration of plaintiff's one-year term, effective July 1, 1992. *See* Plaintiff's Exhibit 25, Minutes of the Board of Trustees meeting, March 23, 1992. As with its October vote, there is no formal record or document of any kind that explains the reasons for the Board's actions. At the meeting, there was virtually no discussion of Professor Jeffries or of his performance as Chairman of the Black Studies Department. *See* Trial Tr. 1007, 1159, 1196, 1306-07, 1690, 1708. Professor Gordon became the new Chairman of the Department as planned on July 1, 1992.

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[11] *See Id.* ("The Executive and Search Committee and the faculty of the Department of Black Studies, have never been informed in writing of any decisions taken by the CUNY Board of Trustees regarding the supervision and/or removal of our Chairman. The Board's action, was, in effect, a direct negation of our May 1991 reelection of Dr. L. Jeffries, Jr. for another three-year period, i.e., September 1991—August 1994.").

On June 5, 1992, roughly one month before Professor Gordon took over, Professor Jeffries commenced this action, alleging that defendants' denial of his full three-year term as Chairman of the Black Studies Department had violated his rights under the first and fourteenth amendments of the United States Constitution. The trial was conducted from April 22, 1993, to May 18, 1993.

After the closings, the Court submitted three separate verdict sheets to the jury. The first verdict sheet contained five questions, which the jury answered in the following manner:

1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department? "Yes."

2. Have the defendants shown by a preponderance or the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech? "No."

3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University? "No."

4. If the answer to question #3 was "no," have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University? "Yes."

5. Has the plaintiff proven by a preponderance of the evidence that the defendants deprived him of property without due process of law? "Yes."

After receiving the jury's responses to Verdict Sheet #1, the Court weighed the jury's factual findings and found that the defendant's rights under the first amendment had been violated. *See* 820 F. Supp. 741 (S.D.N.Y. 1993); Trial Tr. 2035-2040.

In the second verdict sheet on individual liability, the jury determined that two of the defendants—Bernard W. Harleston and W. Ann Reynolds—had violated plaintiff's fourteenth amendment rights and that six of the defendants—Bernard W. Harleston, W. Ann Reynolds, Edith B. Everett, Herman Badillo, Sylvia Bloom, and Harold M. Jacobs—had violated plaintiff's first amendment rights. In the third and final verdict sheet, the jury awarded punitive damages to the plaintiff in the sum of $400,000, divided as follows: $80,000 against each of the four Trustees, Edith B. Everett, Herman Badillo, Sylvia Bloom, and Harold M. Jacobs; $50,000 against Chancellor Reynolds; and $30,000 against President Harleston.

After the verdict, plaintiff moved for a permanent injunction reinstating him to his position as Chairman of the Black Studies Department. Defendants have opposed plaintiff's motion and have moved to overturn the jury's verdict on the ground that the evidence is insufficient to sustain the verdict. The defendants have also moved to overturn the punitive damages award on the grounds that defendants are qualifiedly immune from liability and that the jury verdict with respect to defendants' motivation for denying Professor Jeffries his full three-year term as Chairman is inconsistent.

Discussion

A. Sufficiency of the Evidence

Defendants maintain that they are entitled to judgment as a matter of law or, in the alternative, a new trial because the record does not support several key findings of the jury. *See* Defendants' Memorandum, at 35-48. A jury verdict should be

overturned on the ground that the evidence was insufficient to support the verdict only when:

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [people] could not arrive at a verdict against him.

Mallis v. Bankers Trust Co., 717 F.2d 683, 688-89 (2d Cir. 1983). *See also Bauer v. Raymark Industries, Inc.*, 849 F.2d 790, 792 (2d Cir. 1988), *citing Mallis*; *Berkovich v. Hicks*, 922 F.2d 1018, 1026 (2d Cir. 1991), *citing Bauer*. In light of this standard, and in view of the evidence in the record, the Court denies the defendants' motion with respect to the first amendment issues, but grants the defendants' motion with respect to the fourteenth amendment claim.

With respect to plaintiff's first amendment claim, the defendants argue that the evidence was insufficient to warrant the jury's findings on each of the factors germane to the issue of liability. Judge Kearse has described these factors in two recent opinions. *See White Plains Towing Corp. v. Patterson*, 991 F.2d 1049 (2d Cir. 1993); *Frank v. Relin*, No. 92 Civ. 9026, 93 Civ. 7060 (2d Cir. July 28, 1993). A public employee who seeks judicial relief on the ground that he has been removed because of the exercise of his first amendment speech rights must establish, as an initial matter, that his speech may be fairly characterized as constituting speech on matters of public concern. *White Plains Towing Corp. v. Patterson*, 991 F.2d at 1058 (citations and quotations omitted). "Once the employee establishes that he has spoken as a citizen on a matter of public concern, he must establish that that speech was at least a 'substantial' or 'motivating' factor in the discharge." *Id.*, *citing Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). "If the plaintiff establishes both of these elements, the employer may nonetheless escape liability in either of two ways. It may

prevail if it can show that it would have made the same decision in the absence of the protected conduct, *see Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. at 286, or if it can show that the employee's conduct interfered with its 'effective and efficient fulfillment of its responsibilities to the public,' *Connick v. Myers*, 461 U.S. at 150." *Frank v. Relin*, at 5077-78.

1. The Speech Was a Substantial or Motivating Factor:

Defendants maintain that the evidence is insufficient to support the jury's finding on Verdict Sheet #1 that Professor Jeffries' July 20, 1991 speech was a substantial or motivating factor in the denial of plaintiff's full three-year term as Chairman of the Black Studies Department.

We note initially that in discerning the intentions of defendants, it is rare indeed when a defendant admits on the witness stand that he was motivated by potentially unconstitutional reasons. As a result, juries must often look beyond the testimony and conclusory statements of the witnesses and draw inferences from the evidence.

We believe that the jury could reasonably have inferred from the evidence presented in this case that the July 20, 1991 speech of Professor Jeffries was a substantial or motivating factor in the decision of the defendants to deny him his full three-year term as Chairman of the Black Studies Department. We are persuaded, most significantly, perhaps, by the fact that the defendants have failed to offer an alternative and credible explanation for the about-face in President Harleston's attitude toward the plaintiff that followed immediately upon the heels of the Albany speech of July 20, 1991, and for the dramatic sense of urgency throughout the administration regarding the plaintiff's status that developed immediately following the speech.

As noted, after Professor Jeffries' reelection in June 1991 as Chairman of the Black Studies Department, President Harleston sent the plaintiff a letter of congratulations, indicating that he was satisfied with the performance of the plain-

tiff in his capacity as Chairman. *See* Letter from President Bernard W. Harleston to Professor Jeffries, dated July 1, 1991.[12] A mere three weeks later, however, after plaintiff's speech on July 20, 1991, President Harleston's attitude toward the plaintiff shifted dramatically, and there developed within the CUNY administration an acute absorption and urgency regarding what actions needed to be taken in response to the speech.[13] The evidence establishes that the plaintiff's July 20, 1991 speech and the surrounding controversy led President Harleston to request Provost Pfeffer to review Professor Jeffries' performance as Chair. *See* Trial Tr. 726, 968-69, 1048, 1050. *See also* Plaintiff's Exhibit 9, Letter from President Harleston to Provost Pfeffer, dated September 12, 1991.[14] As described above, the Pfeffer review, however, concluded that Professor Jeffries was adequately fulfilling his duties as Chairman of the Black Studies Department. *See*

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[12] *See also* Trial Tr. 1047-48 (Neither Provost Pfeffer nor Dean Rosen had any objections to plaintiff's reelection as Chair of the Department.).

[13] *See* Plaintiff's Exhibit 5, Letter from President Harleston to City College Colleagues, dated August 8, 1991. See also Plaintiff's Exhibit 7, Letter from Provost Pfeffer to President Harleston, dated August 14, 1991 (". . . it is imperative that the administration move quickly to react to the Jeffries statements. As soon as possible you should convene a meeting with the Black Studies Department and meet with the Executive Committee of the Faculty Senate and Faculty Council to gather opinions. In addition it may be advisable to form a new ad-hoc committee . . . The assigned bodies must be called into action during the first week in September and charged to report back to you no later than the end of September." *Id.* at 4-5); Trial Tr. 720 (cross-examination of Chancellor Reynolds) ("Because the speech we're referring to caused a great media outcry, came to the attention of myself, the board. I made further inquiry, dealt with the media concerns, and moved ahead.").

[14] *See Id.* ("While the focus of this review is whether Dr. Jeffries can now provide effective leadership as Chair of the Black Studies Department *in light of the impact his public statements have had*, if any, upon the present operations of the College, and his department, the ideas he has expressed, including the speech he recently delivered in Albany, are not germane to this review." *Id.* (emphasis added).

Plaintiff's Exhibit 16, Pfeffer "Administrative Review of Leonard Jeffries Jr.", dated Oct. 4, 1991.

Despite the positive result of the Pfeffer review, and despite the fact that there is no indication that anything happened between October 4, 1991 and October 28, 1991 that changed the status of the positive review, the Board of Trustees, upon the recommendation of President Harleston, voted on October 28, 1991, to limit Professor Jeffries' appointment as Chair to one year rather than the customary three-year term. *See* Plaintiff's Exhibit 18, Minutes of the Meeting of the Board of Trustees of the City University of New York, October 28, 1991.[15] Given the positive result of the Pfeffer review, we believe that it was reasonable for the jury to conclude that the cause of President Harleston's recommendation and of the Board's decision to limit the plaintiff's term to one year was plaintiff's July 20, 1991 speech.[16]

We further believe that it was reasonable for the jury to conclude that the March 23, 1992 decision of the Board to appoint Dr. Gordon as Chairman of the Black Studies Department, effectively replacing Professor Jeffries, was motivated in substantial part by the plaintiff's speech. We observe that at the March 23, 1992 meeting, the Board did not

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[15] We observe that while the Elliot Morgan incident occurred on October 18, 1992, (sic) ten days before the Board of Trustee's election on October 28, 1991, there is no evidence that the incident was a factor in President Harleston's recommendation or in the Board's decision. Indeed, there is no evidence that the Trustees were even aware of the incident before they took their vote.

[16] *See* Plaintiff's Exhibit 21, Letter from W. Ann Reynolds to Frederick D. Schmidt of the New York State Assembly, dated November 4, 1991 (". . . I wish to inform you that a recommendation by Dr. Bernard W. Harleston, President of The City College, which I supported, that Dr. Jeffries' term of office as Chairperson of The City College Black Studies Department be limited to one year, through June, 1992, rather than the usual three-year term, was approved on the evening of October 28, 1991, by the Board of Trustees of The City University of New York . . . . We remain deeply disturbed by the irresponsible and inflammatory statements made by Professor Jeffries during the summer at the forum in Albany." *Id.*)

discuss Professor Jeffries or his performance as Chair of the Black Studies Department. *See* Trial Tr. 1007, 1159, 1196, 1306-07, 1690, 1708. In this absence, it was reasonable for the jury to conclude that the motivation for the Board's March 23, 1992 vote was similar to its motivation in voting on October 28, 1991 to limit the plaintiff's term to one year. Indeed, we believe that it was rational for the jury to perceive the October 28, 1991 and March 23, 1992 votes as part of a chain of events that began immediately following the plaintiff's speech and had as their root cause the plaintiff's speech and the publicity surrounding it.[17]

We observe that defendants have presented not one scintilla of credible evidence that the dramatic shift in President Harleston's attitude toward the plaintiff and the accompanying sense of urgency within the administration, as documented in the exhibits, was caused by anything other than plaintiff's July 20, 1991 speech. Nor have the defendants presented credible evidence that this sense of urgency was not the underlying cause for the decision of the defendants to deny the plaintiff his full three-year term, as initially voted on by the Board of Trustees on October 28, 1991, and then again on March 23, 1992.

Moreover, we note that with respect to this factual issue, the Attorney General espoused a position before the jury that contradicted a position he had previously advocated before the Court. Specifically, on the day the jury was to be selected, the Attorney General stated in open court that, in denying plaintiff his full three-year term as Chairman of the Black Studies Department, the defendants were motivated by the July 20, 1991 speech. *See* Trial Tr. 17-18 (April 20, 1993)

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[17] Testimony in the record indicates that several Trustees opposed the continuation of Professor Jeffries' Chairmanship specifically because of the July 20, 1991 speech. *See infra*, n. 24. We believe that this testimony provides sufficient evidence from which a jury could infer that the July 20, 1991 speech was a substantial or motivating factor in the votes of the Board of Trustees which denied plaintiff his full three-year term as Chairman of the Black Studies Department.

(Attorney General argues that defendants were motivated by speech, but only by anti-semitic portions of speech). Subsequently, the Attorney General argued to the jury that the defendants were not motivated by the speech. *See* Trial Tr. 31, 46 (April 22, 1993). We find inexplicable how responsible public officials could take such plainly contradictory positions in federal court, except to note that the Court pointed out to the Attorney General that adherence to his initial position would tend to obviate the need of plaintiff to carry his burden of proof on one of the elements of his first amendment claim. *See Jeffries v. Harleston*, 820 F. Supp. 739, 741 (S.D.N.Y. 1993).

In any case, we believe that it was entirely rational for the jury to conclude that the plaintiff's July 20, 1991 speech, having provoked a media uproar, caused a sense of urgency within the CUNY administration, that this sense of urgency led to the defendants' decision to deny the plaintiff his full three-year term, and that, as a result, the speech was a substantial or motivating factor in the denial of plaintiff's full three-year term as Chairman of the Black Studies Department.

2. But for the July 20, 1991 Speech:

Defendants further claim that the evidence is insufficient to support the jury's finding on Verdict Sheet #1 that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech. In support of this claim, defendants assert that at the time the speech was given, they were already in the process of trying to replace Professor Jeffries. *See* Defendants' Memorandum, at 38.

We observe that while the defendants do seem to have been in the process of searching for a replacement for Professor Jeffries before the speech was given (see Trial Tr. 174-76, 764-65), there is insufficient evidence that there was a purposeful and structured search or a sense of urgency about the matter, the kind of urgency that might lead to a decision not to let the plaintiff serve out his full three-year term. In light

of the fact that the documentary evidence reveals a dramatic and new sense of urgency with respect to Professor Jeffries' status immediately following the plaintiff's July 20, 1991 speech, we believe it was entirely reasonable for the jury to conclude that the speech caused the sense of urgency, and that without this sense of urgency defendants would not have denied the plaintiff his full three-year term as Chairman of the Black Studies Department.[18]

3. Hampering the Effective and Efficient Operation of the School:

Defendants also argue that the evidence contradicts the jury's finding on Verdict Sheet #1 that Leonard Jeffries' July 20, 1991 speech did not hamper the effective and efficient operation of the Black Studies Department, the College, or the University.[19] In support of its position, defendants cite to three "disruptive" incidents (the October 18, 1991 Elliot Morgan incident, the November 12, 1991 confrontation with Dean Rosen and Provost Pfeffer, and the November 15, 1991 confrontation with President Harleston), which, according to defendants, would not have occurred had it not been for the July 20, 1991 speech. *See* Defendants' Memorandum, at 39-40.

The Court does not agree that no reasonable jury could have failed to find the nexus defendants attempt to draw between the three incidents and the plaintiff's July 20, 1991 speech. The defendants' position is undermined by their own presentation at trial of broad evidence of impropriety and

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[18] *See* Trial Tr. 242-43 (Dean Rosen indicates on cross-examination that he may have had concerns about Professor Jeffries' performance before the July 20, 1991 speech, but that these concerns did not rise to a level that would require formal action be taken against Professor Jeffries).

[19] We note that it was the defendants' burden to prove by a preponderance of the evidence that the plaintiff's July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University. *See* Verdict Sheet #1. The jury found that the defendants did not carry this burden.

extremely questionable behavior on the part of Professor Jeffries well before the speech. *See* Defendants' Exhibit F, Letter from Margaret Murphy to Dean Rosen, dated April 1, 1991; Defendants' Exhibit G, Letter from President Harleston to Professor Jeffries, dated September 16, 1988; Defendants' Exhibit H, Memorandum from Morris Silberberg, Dean for Faculty Relations, to President Harleston, dated September 15, 1988; Defendants' Exhibit I, "Report of Inquiry Regarding Allegations Made by Mitchell A. Seligson," dated February 12, 1985; Defendants' Exhibit J, Letter from Bernard Harleston to Professor Jeffries, dated March 8, 1985; Exhibit K, Memorandum from Bernard Harleston to Provost Harry Lustig, *et al.*, dated March 8, 1985. This evidence suggests, and certainly the jury could have found, that the three incidents cited by defendants were not related to the July 20, 1991 speech, but, on the contrary, were characteristic of Professor Jeffries' conduct throughout his tenure at the College.[20]

Beyond these three incidents, defendants rely upon shards of testimony here and there in the record that they say persuasively prove the disruptive impact of the speech. However, there was no attempt to develop a systematic record of such disruption. For example, during his redirect exam, President Harleston remarked that:

> With respect to alumni fund raising, we had evidence that pledges had been either voided or people had failed to make a payment of sort having promised to do so.

Trial Tr. 1263. We observe that defendants made no attempt to provide data or an analysis of alumni giving after the speech. Nor did the defendants present any correspondence from alumni or put on the stand a single alumnus to confirm Professor Harleston's conclusory statement. In the absence of

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[20] In addition, even if the three incidents had been caused by the speech, we believe there is sufficient evidence from which the jury could have concluded that the incidents did not rise to the level of "hampering the effective and efficient operation of the Black Studies Department, the College, or the University."

1992 meeting constitute participation in the violation of plaintiff's constitutional rights.[23] Accordingly, we find that the evidence was sufficient to support the jury's finding that the four Trustees caused a deprivation of Professor Jeffries' rights.[24]

5. Property Interest in Chairmanship:

Defendants also maintain that the evidence is insufficient to support the jury's finding on Verdict Sheet #1 that Leonard Jeffries had a property interest in his Chairmanship once he had been elected. We agree.

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[23] The defendants seem to suggest that Trustees can never be held liable, because they simply defer to the recommendations of the CUNY administration. *See* Defendants' Memorandum, at 43. The Court rejects this attempt to escape responsibility on the part of the Trustees. By all accounts, the Board of Trustees is a powerful and influential institution in the CUNY system. The members of such an institution, we believe, cannot escape accountability for the consequences of their decisions by pointing fingers at those who gave them advice or by claiming that their involvement in the violation of constitutional rights was merely passive.

The Court also rejects defendants' attempt to escape liability on the ground that even had one of them changed their vote, the outcome would have remained the same. Defendants seem to suggest that a Board of Trustees can vote to violate an individual's constitutional rights, and its members can escape personal liability as long as the vote is not close. *See* Defendants' Memorandum, at 42-43. We find the defendants' argument fallacious. Under defendants' reasoning, a participant in the violation of someone's constitutional rights can escape civil liability as long as they can show that the violation would have occurred even without their participation. We do not believe that this "but for" requirement to a finding of personal liability (the constitutional violation would not have occurred, "but for" the participation of the defendant) is applicable to this case.

[24] The Court notes that testimony in the record indicates that the four trustees opposed the continued Chairmanship of Professor Jeffries and that this opposition was a result of the plaintiff's July 20, 1991 speech. *See* Trial Tr. 679-81, 1081, 1627, 1664-65, 1675. We believe that this testimony was sufficient evidence from which a jury could reasonably infer that the opposition of the four trustees to the speech caused them to vote for the appointment of Professor Gordon at the March 23, 1992 meeting. Given the fact that none of the four trustees found liable chose to testify to rebut this inference, we believe that it was reasonable for the jury to infer that the four trustees participated in the deprivation of plaintiff's constitutional rights.

"A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or *mutually explicit* understandings that support [the person's] claim or entitlement to the benefit and that he may invoke a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (emphasis added); *accord Schwartz v. Mayor's Committee on the Judiciary of the City of New York*, 816 F.2d 54, 57 (2d Cir. 1987). Thus, a property interest cannot arise from the mere past practices of an employer. *See Schwartz*, 816 F.2d at 57 ("[T]he fact that many, or even most, incumbent judges have been reappointed cannot raise [plaintiff judge's] subjective expectation' [of being reappointed] to a constitutionally protected right. . . ."); *Hermes v. Hein*, 742 F.2d 350, 355 (7th Cir. 1984); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1099 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Swift v. United States*, 649 F. Supp. 596, 599-600 (D.D.C. 1986). Rather, the government employer must also engage in some sort of affirmative conduct that indicates that the employer's past practices were meant to be part of a "mutually explicit" understanding between it and its employees. *See Bollow*, 742 F.2d at 1099; Swift,. 649 F.Supp. at 599-600.

In the instant case, the only evidence on the record about CUNY's custom or practice regarding appointments of chairpersons, given in the testimony of Chancellor Reynolds (*See* Trial Tr. 530-32, 654-55, 658-60), is that professors who are elected by their departments are almost always approved by the President of CUNY and the Board of Trustees. Under the case authority discussed above, this evidence is insufficient to support Professor Jeffries' contention that after his election to the Chairmanship by his department he had a property interest in the Chairmanship.[25]

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[25] We observe that in order to establish that the denial of his full three-year term as Chairman of the Black Studies Department violated his first amendment rights, plaintiff need not have a "property interest" in the Chairmanship. *See Perry v. Sindermann*, 408 U.S. 593, 599 (1972); *Dube v. State University of New York*, 900 F.2d 587, 597-99 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 2814 (1991).

Moreover, Professor Jeffries' fourteenth amendment claim must fail on another ground. It is well settled in this Circuit that "mutual understandings and customs [do] not create a property interest for purposes of due process when they are contrary to the express provisions of regulations and statutes." *Baden v. Koch*, 638 F.2d 486, 492 (2d Cir. 1980); *accord Hawkins v. Steingut*, 829 F.2d 317, 321-22 (2d Cir. 1987); *Schwartz*, 816 F.2d at 57.

In the instant case, the CUNY Bylaws contemplate that the CUNY President and the Board of Trustees can choose not to approve a Chairperson-elect. *See* Ex. 26, CUNY Bylaws §§ 9.1(b), (c) ("Such elections [for chairperson] shall be subject to the approval of the President and the Board."). The CUNY Board of Trustees is empowered by state statute to adopt Bylaws for CUNY, (*See* N.Y. Educ. Law § 226(10) (McKinney 1988)), and we therefore believe that these Bylaws have the status of "regulations or statutes" within the meaning of *Baden*. Because the Board of Trustees and President Harleston were authorized by the Bylaws to exercise their discretion in appointing department chairpersons, and because raising Professor Jeffries' "subjective expectation" of reappointment to a constitutionally protected interest would contradict the CUNY Bylaws, we conclude that Professor Jeffries' fourteenth amendment claim must fail. *See Hawkins*, 829 F.2d at 321-22; *Schwartz*, 816 F.2d at 56-57; *Baden*, 638 F.2d at 492-93.[26] Accordingly, defendants' motion to dismiss plaintiff's fourteenth amendment claim is granted.

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[26] We observe that raising Professor Jeffries' "subjective expectation" of reappointment to a constitutionally protected interest seems also to contradict N.Y. Educ. Law § 6212(4) (McKinney 1988), which indicates that chairpersons of departments at CUNY do not have "tenure" in their positions as chairpersons. Tenure is defined by the education law as "the right of a person to hold his position during good behavior and efficient and competent service, and not to be removed therefrom except for cause. . . ." N.Y. Educ. Law § 6212(1)(c).

B. Consistency of Verdict

Defendants maintain that they are entitled to judgment as a matter of law vacating the punitive damages award on the ground that the awarding of such damages is precluded by the jury's initial finding as to the defendants' state of mind. In this argument, the defendants refer to question #4 on Verdict Sheet #1, in which the jury found that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University. This motivation, according to the defendants, is incompatible with the notion of evil intent or callous indifference, the states of mind required for an award of punitive damages. *See Smith v. Wade*, 461 U.S. 30, 56 (1983).

The Second Circuit has held that " '[i]t is the duty of the court to attempt to harmonize the answers, if it is possible under a fair reading of them.' " *Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 891 (2d Cir. 1988), *citing* C. Wright & A. Miller, Federal Practice and Procedure § 2510, at 515 (2d ed. 1971). The jury was properly instructed on the elements of punitive damages and on the defendants' defenses. There is a strong presumption that the jury properly followed these instructions. *See United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). Accordingly, a court must uphold the verdict of a properly-instructed jury if there is any "plausible" explanation for the purported inconsistency in their verdict. *See United States Football v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986) ("the Seventh Amendment imposes upon the courts a constitutional obligation to search for an interpretation of the case which reconciles the verdicts, . . . and which respects the principle that 'juries are not bound by what seems inescapable logic to judges' " *Id.* at 1046 (citations omitted)), *aff'd*, 842 F. 2d 1335 (2d Cir. 1988).

In view of this standard, we do not believe that the jury's verdict with respect to the defendants' motivation is incompatible with a finding of punitive damages. Specifically, we believe that there are two possible interpretations of the jury's verdict which would reconcile these assertedly inconsistent findings. First, the jury could have reasonably believed that the six defendants found liable all shared a reasonable expectation that the plaintiff's July 20, 1991 speech would cause hampering of the efficient and effective operation of the University, but at the same time, that these six defendants were aware that they could not retaliate against Professor Jeffries in response to his speech unless there was actual hampering, not just the future prospect of disruption. In such a scenario, the six defendants, by denying plaintiff his full three-year term, would have been knowingly and willfully violating the constitutional rights of the plaintiff, in a manner that a jury could reasonably have found warranted an award of punitive damages.

Second, in answering question #4 on Verdict Sheet #1, the jury could have reasonably found that while a majority of the defendants had a reasonable expectation that the plaintiff's July 20, 1991 speech would cause hampering of the efficient and effective operation of the University, the six defendants found liable did not have this reasonable expectation. Thus, we believe that the jury could have interpreted question #4 on Verdict Sheet #1 as a finding with respect to the collective or majority state of mind of the defendants, but that this finding did not preclude the jury's subsequent finding that individual defendants did not share the reasonable expectation of hampering.

Accordingly, we do not believe that the awarding of punitive damages was inconsistent with the jury's initial finding with respect to the defendants' state of mind, and we deny defendants' motion to vacate the punitive damage awards.

C. Qualified Immunity

Defendants contend that the jury's punitive damages award should be set aside because the defendants are entitled to qualified immunity.[27] We disagree.

The Second Circuit has recently stated that

> [t]he doctrine of qualified immunity shields state officials from liability for damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known, or even where the rights were clearly established, if it was objectively reasonable for defendants to believe that their acts did not violate those rights. An official does not have such immunity where the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right. To determine whether a particular right was clearly established at the time defendants acted, a court should consider: (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful.

White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1064-65 (2d Cir. 1993) (citations and internal quotation marks omitted).[28] The Supreme Court has made clear that an official

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[27] In their post-trial motions, defendants have not contested the correctness of our pretrial, and trial orders in this case. Nevertheless, our qualified immunity discussion should also be read as an elaboration of the legal reasoning behind those Orders, particularly those Orders of April 21, 1993 (820 F. Supp. 739 (S.D.N.Y. 1993)) and May 11, 1993 (820 F. Supp. 741 (S.D.N.Y. 1993)).

[28] Defendants have cited numerous cases from other circuits as support for their claim that Professor Jeffries' first amendment rights were not clearly established at the time that defendants denied Professor Jeffries a full three-year term as Chairman of the Black Studies

is not entitled to qualified immunity simply because at the time of the official's act no court had held that exact type of act unlawful. Rather, an official is entitled to qualified immunity only if in light of preexisting law the unlawfulness of the official's act would not have been apparent to the official at the time that he or she committed it. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As we noted above, the legal issue in this case is whether a University may deny a professor a department chairmanship because of the professor's out-of-class speech, when the professor's speech substantially involved matters of public concern and where the speech caused no actual interference with the functioning of the University. Although neither the Second Circuit nor the Supreme Court has ruled on this specific question, we believe that in light of the Second Circuit's decision in *Piesco v. City of New York Dept. of Personnel*, 933 F.2d 1149 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 331 (1992), and the Supreme Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), that at the time the defendants unconstitutionally denied Professor Jeffries a full three-year term as Chairman of the Black Studies Department, reasonable persons in defendants' positions would have understood that this denial was unlawful.

In *Piesco*, the plaintiff, Dr. Judith Piesco, was the Deputy Personnel Director for Examinations in the New York City Department of Personnel ("DOP"). "In that capacity, she was responsible for the administration of the Bureau of Examinations, the largest bureau within DOP. The Bureau of Examinations is charged with the preparation, evaluation, and

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Department. As is apparent from the Second Circuit's opinion in *Patterson*, the relevant authority that we must look to in determining whether Professor Jeffries' first amendment rights were clearly established is opinions of the United States Supreme Court and opinions of the United States Court of Appeals for the Second Circuit. Because we find, *infra*, that under this authority, Professor Jeffries' first amendment rights were clearly established at the time defendants denied him a full three-year term we need not look to cases in other circuits. Nevertheless, at some points in this opinion, we will distinguish case authority from other circuits.

administration of all civil service tests for the City of New York. During Dr. Piesco's tenure at DOP, the size of her staff fluctuated between 175-200 employees." *Id.* at 1151.

During testimony before a New York State Senate Committee, Dr. Piesco indicated to the Committee that a functional illiterate could pass the Police Academy Entrance Examination. *See Id.* at 1152. In response to Dr. Piesco's testimony, the *Piesco* defendants gave Dr. Piesco two negative performance evaluations which improperly criticized her conduct, placed a letter in Dr. Piesco's personnel file that criticized Dr. Piesco for her behavior at a July 31, 1985 meeting, and excluded Dr. Piesco "from two meetings with Commissioners from other agencies." *Id.* at 1153. Moreover, eight days after Dr. Piesco commenced a section 1983 action against the *Piesco* defendants, the *Piesco* defendants fired her. The *Piesco* defendants presented no evidence to the Court that Dr. Piesco's testimony to the Senate Committee "either interfered with DOP's efficient functioning or impeded the proper performance of [Dr. Piesco's] daily duties." *Id.* at 1159.

In balancing the interests of DOP and Piesco, as is required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Second Circuit emphasized that Dr. Piesco's testimony had to be accorded significant weight in the *Pickering* balance because "speech critical of the government is precisely the kind of speech that the first amendment was designed to protect." *Piesco* 933 F.2d at 1157. Citing *Connick v. Meyers*, 461 U.S. 138 (1983), and *Connick's* progeny, the Second Circuit held that "[w]here the statements involved so clearly touch on matters of public concern, the government is required to demonstrate interference with the efficient functioning of the workplace." *Piesco*, 933 F.2d at 1160. Because the *Piesco* defendants, as noted above, had not demonstrated such interference, the Court held that Dr. Piesco's interest in her testimony "[took] precedence over the City's interest in efficiently performing government services." *Id.* at 1158.

The Court also denied the *Piesco* defendants qualified immunity. *See Id.* at 1160-61. The Court emphasized that it

was clearly established at the time the *Piesco* defendants retaliated against Dr. Piesco, that retaliation against a public employee because of the employee's criticism of the government was unlawful.[29] *See Id.* at 1161. Moreover, the Court stated that in light of a Department of Investigation Report, that had been released three weeks prior to Dr. Piesco's dismissal and which found that some of the *Piesco* defendants' actions were retaliatory and thus improper, "it [was] incomprehensible how [the *Piesco* defendants] reasonably could have considered their subsequent discharge of Dr. Piesco to be lawful." *Id.* Thus, *Piesco* clearly held that public employees may not be fired from their jobs in retaliation for speech that substantially involves matters of public concern and which does not interfere with the efficient functioning of their employers' office.

In the instant case, we have already found that Professor Jeffries' July 20, 1991 speech, which criticized the current educational curricula in this nation's public schools, "substantially involved matters of public concern and 'should be accorded significant weight in the *Pickering* balance.' " *Jeffries v. Harleston*, 820 F. Supp. 741, 743 (S.D.N.Y. 1993) (quoting *Piesco*, 933 F.2d at 1157). Moreover, the jury determined that Professor Jeffries' July 20, 1991 speech was a substantial or motivating factor in the defendants' denial to Professor Jeffries of a full three-year term as Chairman of the Black Studies Department, and the jury found that Professor Jeffries July 20, 1991 speech did not hamper the effective and efficient operation of the Black Studies Department, the College, or the University. *See Id.* at 742. After *Piesco*, it should have been apparent to defendants that their actions were unconstitutional. Moreover, we believe that defendants' claims of qualified immunity are especially specious in light

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[29] Though the Court did not explicitly say so, we assume that the Court meant that at the time the *Piesco* defendants retaliated against Dr. Piesco, it was clearly established that a public employee may not be fired for speech critical of the government, when the speech has not interfered with the efficient functioning of the employee's workplace.

of this Court's September 4, 1991 decision in *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992), which put defendants on notice that retaliation against a faculty member for out-of-class speech that does not interfere with the functioning of the University is unconstitutional. Thus, we believe that defendants are not entitled to qualified immunity with respect to Professor Jeffries' first amendment claim.

Defendants contend that they are entitled to qualified immunity with respect to Professor Jeffries' first amendment claim because it was not clearly established at the time that they denied Professor Jeffries a full three year-term that it is unconstitutional to deny a person a chairmanship, as opposed to a professorship, because of the person's speech. Defendants apparently assert that because a department chairman has greater responsibility than does a professor and because a department chairman is higher up in the academic hierarchy than is a professor, reasonable officials in defendants' positions would not have known that denying Professor Jeffries his Chairmanship would violate his first amendment rights. We disagree. As noted above, the plaintiff in *Piesco* was head of the Bureau of Examinations, the largest Bureau in DOP, and had a staff that fluctuated between 175 and 200 persons. Dr. Piesco's department was responsible for "the preparation, evaluation, and administration of *all* civil service tests for the City of New York." *Piesco*, 933 F.2d at 1151 (emphasis added); *see also Id.* at 1157 (recognizing Dr. Piesco's senior position at DOP). Nevertheless, the Second Circuit held that the *Piesco* defendants violated Dr. Piesco's first amendment rights.

In the instant case, we believe that while important, the responsibilities of a Department Chairperson at City College[30]

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[30] The CUNY Bylaws describe the duties of a department chairperson as follows:

"Section 9.3 DUTIES OF DEPARTMENT CHAIRPERSON. a. The department chairperson shall be the executive officer of his/her department and shall carry out the department's policies, as well as those of the faculty and the board which are related to it. He/she shall:

are not as significant as those of the plaintiff in the *Piesco* case.[31] Moreover, even if the responsibilities of Dr. Piesco and

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1. Be responsible for departmental records.

2. Assign courses to and arrange programs of instructional staff members of the department.

3. Initiate policy and action concerning the recruitment of faculty and other departmental affairs subject to the powers delegated by these bylaws to the staff of the department in regard to educational policy, and to the appropriate departmental committees in the matter of promotions and appointments.

4. Represent the department before the faculty council or faculty senate, the faculty and the board.

5. Preside at meetings of the department.

6. Be responsible for the work of the department's committee on appointments or the department's committee on personnel and budget which he/she chairs.

7. Prepare the tentative departmental budget, subject to the approval by the department's committee on appointments or the department's committee on personnel and budget.

8. Transmit the tentative departmental budget to the president with his/her own recommendations.

9. Arrange for careful observation and guidance of the department's instructional staff members."

Plaintiff's Ex. 26, CUNY Bylaws § 9.3.

[31] Defendants contend that *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), supports their position that they are entitled to qualified immunity with respect to Professor Jeffries' first amendment claim. In *Hall*, the University of the District of Columbia ("UDC") fired its Athletic Director for statements he made about possible UDC violations of NCAA and UDC rules. *See Id.* at 257. On an appeal from the dismissal of the complaint, the Court of Appeals for the D.C. Circuit held that even though the complaint did not allege that concrete harm had resulted from the statement, the Court could "draw inferences of harm from the employee's speech, his position, and his working relationship with his superior." *Id.* at 261. We believe that *Hall* is inapposite.

First of all, subsequent cases interpreting *Hall* have made clear that *Hall* did not do away with the concrete harm requirement of *Rankin*. These cases have emphasized that *Hall* was decided on a motion to dismiss, and that *Hall* only held that on a motion to dismiss in a *Pickering*-type case a court may draw reasonable inferences of harm from the information contained in the complaint. *See Fire Fighters Association, District of Columbia v. Barry*, 742 F. Supp. 1182, 1191 (D.D.C. 1990)

Professor Jeffries could be considered equivalent, the *Piesco* case clearly established that a person's high government position does not give the government license to retaliate against that person for the person's speech.[32] Finally, the fact that Professor Jeffries may have been a spokesperson for his department does not change this analysis since Dr. Piesco, as evidenced by her testimony before the New York State Senate, was a spokesperson for DOP.

Defendants maintain that at the time that defendants denied Professor Jeffries a full three-year term as Chairman, Supreme Court authority, the *Piesco* decision, and other Second Circuit cases established only that a public employee may not be retaliated against for whistleblowing or for testimony that that employee provides to a branch of government. Defendants also contend that Supreme Court authority, the *Piesco* decision, and other Second Circuit cases did not clearly establish at that time that before firing an employee for speech that substantially involves matters of public concern, the government must show that the speech caused actual

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(discussing Hall); *Chico Police Officers' Association v. City of Chico*, 283 Cal. Rptr. 610, 621 n.10 (Cal. Ct. App. 1991) (same). In the instant case, we have had a full trial on the merits, and the jury has made a factual finding that Professor Jeffries' July 20, 1991 speech did not cause any actual harm to the efficient operation of the University.

Moreover, to the extent that *Hall* can be interpreted to stand for the proposition that a defendant need not prove actual harm to the functioning of the government office to justify dismissing a high-level policy-making official because of the official's speech, we believe that *Hall* directly conflicts with *Piesco*. As *Piesco* is a Second Circuit case, we believe, as discussed above, that it was clearly established at the time that defendants denied Professor Jeffries his three-year terms as Chairman of the Black Studies Department, that defendants' actions violated Professor Jeffries' first amendment rights.

[32] Of course, as the Second Circuit acknowledged in *Piesco*, the seniority of a public employee's position is a relevant factor for courts to consider in performing the *Pickering* balancing test. *Piesco*, 933 F.2d 1157. Implicit in our May 11, 1993 Order (*See Jeffries v. Harleston*, 820 F. Supp. 741 (S.D.N.Y. 1993)), is our determination that Professor Jeffries' position as Department Chairperson is not enough to tip the scales of the *Pickering* balance in favor of the defendants in this case.

interference to the efficient functioning of the government office. We believe that defendants read *Piesco*, the Supreme Court authority, and other Second Circuit cases too narrowly.

In *Rankin v. McPherson*, 483 U.S. 378 (1987), Rankin, a government employee of a law enforcement agency, was discussing with a colleague the President's policies and said that she hoped that if another assassination attempt were made on the President, the attempt would be successful. *See Id.* at 381. As a result of Rankin's statement about her hopes regarding a future assassination attempt on the President, McPherson, Rankin's superior, fired Rankin. *See Id.* at 382. The Supreme Court held that because McPherson had failed to show any concrete negative effects of Rankin's statement on the functioning of McPherson's office, McPherson had violated Rankin's first amendment rights when he fired her because of her statement. *See Id.* at 388-89, 392; *Id.* at 393 n.* ("[i]n this case, however, there is no objective evidence that [plaintiff's] lone comment had any negative effect on the moral or efficiency of the Constable's office) (Powell, J., concurring).[33] Thus, it is apparent from *Rankin* that in cases where a public employee's speech involves matters of substantial public concern and is not whistleblowing or giving testimony to a branch of government, the government may not fire the employee for the speech unless the government can show that the employee's speech actually interfered with the functioning of the government office. *See Piesco*, 933 F.2d at 1159 (interpreting *Rankin* in the way that we propose).[34]

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[33] We recognize that *Rankin* involved an employee whose "duties were purely clerical." *Rankin*, 483 U.S. at 392. However, as noted *supra* and *infra*, we believe that the *Piesco* decision clearly established that the first amendment principles the Supreme Court announced in *Rankin* apply to high level officials as well.

[34] The Second Circuit decision in *Piesco* echoed the Supreme Court's holding in *Rankin* concerning the importance of first amendment protection for statements about issues of substantial public concern. In at least two places, the *Piesco* Court emphasized that speech that is critical of the government is exactly the type of speech that should be accorded greater weight in the *Pickering* balance. *See Piesco*, 933 F.2d at 1157, 1161.

Moreover, the *Piesco* Court made clear that the first amendment principles it discussed were not applicable only to whistleblowers or to persons who testify before branches of government. The *Piesco* Court cited the employees' speech in *Rankin v. McPherson*, 483 U.S. 378 (1987), and *American Postal Workers Union v. United States Postal Service*, 830 F.2d 294 (D.C. Cir. 1987), as examples of the types of speech for which a public employee may not be fired without a showing by the employer that the speech actually interfered with the functioning of the government office. *See Piesco*, 933 F.2d at 1159. As noted above, the *Rankin* case involved a discussion about the President and his policies. Moreover, the employee's speech in *American Postal Workers* was a letter about the importance of encouraging fellow workers to join a union. Thus, it is clear that the defendant's characterization of *Piesco* as only establishing that a public employee may not be retaliated against for testimony that the employee provides to a branch of government, is incorrect.[35]

Defendants contend that Professor Jeffries' comments on who he believed financed the slave trade and built the pyramids, and Professor Jeffries' remarks on how to express the notions of "duality" and "polarity" through a "pyramid analysis" do not deal with matters of substantial public concern. We disagree. Though historically and analytically suspect, these comments revealed what information Professor Jeffries believed should be included in a multicultural curriculum and what mode of analysis he thought should be used in analyzing that information.[36]

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[35] Defendants also cite *Giacalone v. Abrams* to support their qualified immunity argument. In *Giacalone*, the Second Circuit determined that "the nature of Giacalone's comment suggest[ed] that his First Amendment interests were entitled to comparatively little weight" in the *Pickering* balancing test. *Giacalone v. Abrams*, 850 F.2d 79, 86 (2d Cir. 1988). In the instant case, the Court has already determined that the plaintiff's speech touches upon an issue of substantial public concern. Therefore, *Giacalone* is inapposite.

[36] Defendants cite *Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988), and *Berg v. Hunter*, 854 F.2d 238 (1988), for the proposition that "the

In their briefs, defendants point out that Professor Jeffries made various remarks in his July 20, 1991 speech that were perceived as anti-semitic and consisted of attacks against a number of individuals. Defendants maintain that because of these remarks, reasonable officials in the defendants' positions would not have known that their belief that Professor Jeffries' speech would cause interference with the functioning of the University was not a sufficient basis under the Constitution to deny Professor Jeffries a full three-year term as Chairman of the Black Studies Department. While we recognize that a number of Dr. Jeffries remarks in his July 20, 1991 speech were vulgar, repugnant, and reprehensible, we disagree with defendants' argument.[37] In *Rankin*, the Supreme Court analyzed the employee's controversial statement in the context of the employee's entire conversation with her colleague. *See Rankin*, 483 U.S. at 386-87 & n.10. The Court held that because the employee's statement was part of a conversation about the President and his policies, the statement

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available case law suggests that decisions removing plaintiffs from chairs at academic institutions are generally upheld under the *Pickering* test." Defendants' Memorandum, at 21. We find defendants' argument to be meritless. In *Garvie*, the Court found in favor of the defendants because it determined that the speech at issue was not a matter of public concern. *Garvie*, 845 F.2d at 650-51. In *Berg*, the Court found in favor of the defendants because the plaintiff's speech caused actual interference with the functioning of the government office. *Berg*, 854 F.2d at 243-44. As is apparent, *Garvie* and *Berg* are inapposite.

[37] The defendants cite *Mings v. Department of Justice*, 813 F.2d 384 (Fed. Cir. 1987), to support their argument that they are entitled to qualified immunity. In *Mings*, the plaintiff was fired for expressing, through internal agency channels, only racist statements and personal grievances about the functioning of the Immigration and Naturalization Service. *See Mings*, 813 F.2d at 387. We believe that *Mings* is inapposite. First of all, the Federal Circuit decided Mings before the Supreme Court decided *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Mings* may not survive *Rankin*. Moreover, the speech in *Mings*, when viewed as a whole, is clearly of less public concern than that of Professor Jeffries. Finally, the plaintiff in *Mings* made his statement in a law enforcement context, and therefore he was entitled to less first amendment protection than public employees in non-law enforcement agencies. *See McMullen v. Carson*, 754 F.2d 936, 939-940 (1985).

plainly dealt with a matter of public concern. *See Id.* The Court stated that

> [t]he inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern. [D]ebate on public issues should be uninhibited, robust, and wide open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.

Id. at 387 (quotation marks and internal citations omitted). We believe that *Rankin* clearly established that caustic statements that are *related to* and are made in the context of a speech which discusses an issue of substantial public concern, must also be considered statements about an issue of substantial public concern.[38]

In the instant case, Professor Jeffries made many of his personal attacks in the context of discussing those people who disagreed with his position on a multicultural curriculum in the New York State public schools.[39] Moreover, Professor

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[38] We agree with the D.C. Circuit's assertion that *Rankin* does not stand for the proposition that,

> any statement 'dropped' into the middle of a discussion on a matter of public concern [is considered itself a matter of public concern]. . . . *Rankin* appears to require that the speech for which the public employee has been disciplined must be "related" or "connected" to the speech on a matter of public concern in order for the contextual justification to apply to the *Pickering* formula. We need not define the precise outer boundaries of this "relatedness" because, whatever its limits, the *Rankin* precedent shows conclusively that [Professor Jeffries'] speech falls well within those boundaries.

American Postal Workers Union v. United States Postal Service, 830 F.2d 294, 303 n.8 (D.C. Cir. 1987).

[39] The defendants argue that *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989), supports their contention that at

Jeffries' description of Dr. Bernard Sohmer as the "head Jew at City College" and Professor Jeffries' reference to discussions he had with "[his] Jews at city college" came in the context of Dr. Jeffries' description of his conversations with Jewish members of the City College faculty about the alleged role of Jews in the slave trade. Because Professor Jeffries' caustic remarks are clearly related to his speech as a whole, we believe that reasonable officials in defendants' positions should have known that Dr. Jeffries' entire speech was protected.[40]

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the time defendants denied Professor Jeffries a full three-year term as Chairman of the Black Studies Department, it was not clearly established that a public employee who makes a speech which contains personal attacks against the employee's superiors can only be fired because of the speech if the speech causes actual harm to the functioning of the government office. We disagree. In *Dartland*, the plaintiff's statement primarily involved personal complaints about how the plaintiff's supervisor managed the plaintiff's position, and thus the statement was of limited public concern. *See Dartland*, 866 F.2d at 1322 (the plaintiff told a reporter that his superior was a "paid lackey" who had a "total misconception of what [the plaintiff] does"). By contrast, we have found that Professor Jeffries' speech discusses the state of the American educational system—a matter of substantial public concern. Thus, *Dartland* is inapposite.

[40] Defendants cite *McMullen v. Carson*, 754 F.2d 935, 937 (11th Cir. 1985), to support their position that it was not clearly established at the time defendants denied Professor Jeffries a full three-year term as Chairman of the Black Studies Department that actual hampering of the effective operation of a government agency must be shown to justify the government's firing of an employee because of the employee's speech containing racist statements. We disagree.

In *McMullen*, the defendant Sheriff fired the plaintiff an employee in the Sheriff's department, after the plaintiff had appeared on television identifying himself as both a Klan recruiter and an employee of the Sheriff's office. *See Id.* at 937. The Court held that the Sheriff did not violate the plaintiff's first amendment rights even though the Court found no actual disruption of the effective operation of the Sheriff's department. *McMullen* 754 F.2d at 940. There was, however, evidence in the record of a serious backlash from the community immediately after the television interview and prior to plaintiff's dismissal. *See Id.*

The Court in *McMullen* explicitly limited its holding to employees of law enforcement agencies. *See Id.* at 938 ("the . . . critical factor here

In sum, we believe that defendants are not entitled to qualified immunity on Professor Jeffries' first amendment claim.[41]

D. Punitive Damages:

Defendants maintain that the punitive damage awards ($30,000 against President Harleston, $50,000 against Chancellor Reynolds, and $80,000 against each of the four Trustees) are excessive. We observe that the Court has already set aside the plaintiff's fourteenth amendment claim. As one out of two of the claims against President Harleston and Chancellor Reynolds has been dismissed, the Court believes that a fifty percent reduction in the punitive damage awards against these two defendants is appropriate. Accordingly, we reduce the punitive damage award against President Harleston from $30,000 to $15,000 and the award against Chancellor Reynolds from $50,000 to $25,000.

An award of punitive damages should be set aside when it shocks the judicial conscience (*See Hughes v. Patrolmen's Benev. Ass'n of City of N.Y. Inc.*, 850 F.2d 876, 883 (2d Cir.), *cert. denied*, 488 U.S. 967 (1988), *citing Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978)), or when it is not reasonably

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is that plaintiff was employed by a law enforcement agency, the members of which are subject to greater First Amendment restraints than most other citizens"). The Court then emphasized that public confidence in the Sheriff's department is essential to the department's ability to keep the peace. *See Id.* at 940 ("We hold only that a law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties."). Thus, we believe that *McMullen* is distinguishable from the instant case and is inapposite.

[41] Because we have dismissed plaintiff's fourteenth amendment claim, we need not analyze defendants' fourteenth amendment qualified immunity arguments. Moreover, even if our determination that plaintiff's fourteenth amendment claims must be dismissed is erroneous, we hold that defendants are entitled to qualified immunity on this claim.

calibrated to a defendant's financial circumstances. *See Smith v. Lightning Bolt Products, Inc.*, 861 F.2d 363, 373 (2d Cir. 1988).

We observe that the defendants were put on notice by the *Levin v. Harleston* decision that retaliation against a faculty member for exercise of his or her free speech rights, in the absence of any actual interference in the functioning of the University, is prohibited by law. *See Levin v. Harleston*, 770 F. Supp. 895, 921-22 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). Despite this notice, the defendants proceeded to retaliate against Professor Jeffries for his speech outside the University. Under these circumstances, we do not find that the punitive damage awards against the defendants shock the judicial conscience.

Defendants cite *Piesco v. City of New York*, 1993 W.L. 37100 (S.D.N.Y. 1993), in which a jury awarded punitive damages of $50,000 against each of two defendants, to a city employee who had been fired for giving sworn testimony about examination standards in the Police Department to a legislative committee. The Court believes that the gravity of the defendants' actions in this case is at least as serious as the gravity of the defendants' actions in *Piesco*, especially in light of the fact that in this case, the *Levin v. Harleston* decision put defendants on notice. We believe that the difference between the $50,000 awarded against each of the *Piesco* defendants and the $80,000 awarded against each of the four Trustees is reasonable under the circumstances. Accordingly, the Court declines to reduce the awards. We also find that in view of the $50,000 award against each of the *Piesco* defendants, the $15,000 award against President Harleston and the $25,000 award against Chancellor Reynolds do not shock the judicial conscience.

In addition, in view of the fact that the defendants presented no evidence as to their financial circumstances, we will not overturn the award on the grounds of financial hardship to the defendants. *See Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992). *See also Zarcone v. Perry* (". . . the decided cases

and sound principle require that a defendant carry the burden of showing his modest means—facts peculiarly within his power—if he wants this considered in mitigation of damages." 572 F.2d at 56); *Smith v. Lightning Bolt Products, Inc.*, (". . . it is the defendant's burden to show that his financial circumstances warrant a limitation of the award." 861 F.2d at 373, *citing Zarcone v. Perry).*

Accordingly, the Court cuts in half the punitive damage awards against President Harleston and Chancellor Reynolds, but finds that the punitive damage awards against each of the four Trustees is not excessive.

E. Permanent Injunction—Reinstatement:

We now address the most troubling and nettlesome aspect of this case, the return of Professor Jeffries to the Chairmanship. To justify permanent injunctive relief from a constitutional violation, a plaintiff must establish three elements: the fact of the constitutional violation, the presence of continuing irreparable injury if the relief is not granted, and the lack of an adequate remedy at law. *See Levin v. Harleston*, 770 F.Supp. 895, 918 (S.D.N.Y. 1991), *aff'd in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992). *See also New York State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Rondeau v. Mosinee Paper Corporation*, 422 U.S. 49, 57 (1975); *Farmland Dairies v. McGuire*, 789 F. Supp. 1243, 1250 (S.D.N.Y. 1992); *Rosenberg v. Meese*, 622 F. Supp. 1451, 1476 (S.D.N.Y. 1985). The jury and the Court have already determined the fact of the constitutional violation.

The plaintiff maintains that the denial of his full three-year term as Chairman of the Black Studies Department constitutes irreparable injury. The Chairmanship of the Black Studies Department at City University carries with it a prestige both within and outside the University. In addition, the Chairmanship gives its holder a significant degree of power and influence over the policies and direction of the Black Studies Department. The denial of Professor Jeffries' full

three-year term as Chairman of the Black Studies Department constitutes a loss to the plaintiff of this prestige and power associated with the office. We believe this loss constitutes irreparable harm to the plaintiff.[42] Furthermore, plaintiff appears to have no adequate remedy at law.[43] The future prospect of one day being reelected to the Chair is no adequate remedy to Professor Jeffries,[44] and does not eliminate the irreparable harm to plaintiff.[45]

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[42] The Court observes that the Department Chair of the Black Studies Department receives no monetary compensation. Presumably, the power and prestige that accompany the position compensate for the extra responsibilities. *See Ezekwo v. NYC Health & Hospitals Corp.*, 940 F.2d 775, 783 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 657 (1991). The Court believes that this power and prestige is not capable of reliable calculation in terms of a damage figure. Moreover, we believe that the lack of monetary compensation for the position of Department Chair is a recognition by the University that the attributes of the office are valuable in and of themselves and are not easily transferrable into a monetary figure. These facts support the plaintiff's position that the denial of his full three-year term constitutes irreparable harm to plaintiff. As the Court pointed out in *Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F. Supp. 603 (S.D.N.Y. 1981), "the Second Circuit has recognized that even in situations where damages are available, irreparable harm may be found if damages are '*clearly difficult to assess and measure.*' " *Id.* at 607, *citing Danielson v. Local 275, Laborers International Union of North America*, 479 F.2d 1033, 1037 (2d Cir. 1973). We observe that the punitive damages awarded in this case do not represent either compensation for or a measure of the injury suffered.

[43] *See Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70 (2d Cir. 1979) ("irreparable injury means injury for which a monetary award cannot be adequate compensation . . ." *Id.* at 72); *Gulf & Western Corp. v. Craftique Productions, Inc.*, ("If the injury complained of may be compensated by an award of monetary damages, then an adequate remedy at law exists and no irreparable injury may be found as a matter of law." 523 F. Supp. at 607).

[44] Defendants seem to argue that plaintiff was not irreparably injured because he can seek the Chairmanship of the Black Studies Department at the next election. *See* "Defendants' Supplementary Memorandum of Law in Opposition to Plaintiff's Application for Injunctive Relief," July 9, 1993, at 5. Indeed, Professor Jeffries can seek the position of Chairman at the next election. In the meantime, however, the constitutional violations of Professor Jeffries' rights and the accom-

(footnote 45 appears on next page)

We now turn to the matter of balancing the equities. Defendants correctly point out that courts in this Circuit have considered "the balance of equities" in determining whether to award a permanent injunction. *See Automotive Elec. Serv.*

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panying injury will continue if the Court does not reinstate the plaintiff to the position of Chairman of the Department. The Court will not allow the injury to Professor Jeffries to continue pending a new election, when Professor Jeffries has already won a valid election but was unconstitutionally denied his right to serve out his three-year term.

The defendants further maintain that if Professor Jeffries is reinstated as Chairman of the Black Studies Department, it should only be for a period of one year. *See* Defendants' "Memorandum of Law in Reply to Plaintiff's Opposing Memorandum and in Further Support of Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, a New Trial, and Further Opposition to Plaintiff's Request for Injunctive Relief" ("Defendants' Reply Memorandum"), June 14, 1993, at 21. The defendants reason that if Professor Jeffries had not been denied his full three-year term, his term would have expired in one year. The plaintiff, however, was denied the two years remaining in his term, and will be made whole only if he is allowed to serve as Chairman for the full two years that he was denied by the defendants' unconstitutional actions. Accordingly, the Court reinstates Professor Jeffries as Chairman of the Black Studies Department for a full two years.

[45] Plaintiff also maintains that defendants' actions created a "chilling effect" on plaintiff's first amendment rights, discouraging and deterring the plaintiff from speaking freely out of fear of further sanction. *See* "Plaintiff's Reply Memorandum," June 14, 1993 ("After the uncertainty following Defendants' actions, he was inhibited and certainly, following the March 23, 1991 (sic) action by the Trustees, there is little evidence that his speech was as wide ranging as before." *Id.* at 4). Such a chilling effect would certainly constitute irreparable injury supporting injunctive relief. *See Levin v. Harleston*, 966 F.2d at 89 ("It is settled that governmental action which falls short of a direct prohibition on speech may violate the First Amendment by chilling the free exercise of speech" *Id.*); *Ostrowski v. Local 1-2, Utility Workers Union of America, AFL-CIO*, 530 F. Supp. 208 (S.D.N.Y. 1980) ("a showing of a 'chilling effect' on plaintiffs' exercise of First Amendment rights is adequate to support injunctive relief." *Id.* at 215). However, the plaintiff presented no evidence at trial that defendants' denial of his full three-year term has created a chilling effect on plaintiff's speech. There is insufficient evidence in the record that plaintiff faced any further sanction as a result of his speech, and insufficient evidence that Professor Jeffries toned down his speeches following the denial of his full three-year term.

Corp. v. Ass'n of Automotive Aftermarket Distrib., 747 F. Supp. 1483 (E.D.N.Y. 1990) ("the balance of equities must tip decidedly in favor of the plaintiff [seeking permanent injunctive relief]. . . ." *Id.* at 1513). *See also Town of Huntington v. Marsh.* 884 F.2d 648, 654 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Travellers Intern. AG v. Trans World Airlines, Inc.*, 722 F. Supp. 1087, 1096 (S.D.N.Y. 1989). Defendants maintain that the equities tip in their favor, because plaintiff's reinstatement would "jeopardize the needs of the Department and its students . . ." "Memorandum of Law in Support of Defendants' Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial, and in Opposition to Plaintiff's Request for Injunctive Relief" ("Defendants' Memorandum"), June 16, 1993, at 52. Moreover, defendants allege, "plaintiff does not grasp the sensitivities and sensibilities essential for working in an ethnically diverse environment which has established policies intended to bridge, rather than exacerbate, relations between different ethnic and religious groups." *Id.* at 57.

Defendants again cite to the aforementioned four incidents that are said to demonstrate plaintiff's "disruptive and damaging" behavior. *Id.* at 58.[46] The Court views the incident with Elliot Morgan, a student reporter from the *Harvard Crimson*, as the most substantial and disturbing of these incidents, particularly in light of the fact that plaintiff did not seek to challenge in Court the veracity of Mr. Morgan's testimony. The professor's behavior can fairly be described as thuggish, and incompatible with the civilized discourse and conduct expected of tenured professors. However, we do not find that this incident, and the three others, taken, as a whole, rise to a level that would justify denying plaintiff injunctive relief. Furthermore, even though the jury's verdict does not bind the Court on the equities question, we note that the jury gave little if any weight to these incidents, including the Morgan affair. In considering the record in this case, we find that the

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[46] For a description of the four incidents, see pages 12-14 of this Opinion.

equities tip in favor of the plaintiff, whose first amendment rights were unconstitutionally violated by defendants, and whose injury will continue until he is restored as Chairman of the Department.

The Court declines to enter a debate on the relative qualifications of Professor Gordon versus Professor Jeffries or between the merits of their different approaches to Black Studies. The defendants seem to request that this Court use its broad equitable powers to decide the question of who would make a better Chairman. *See* Defendants' Memorandum, at 51-52; Defendants' Reply Memorandum, at 24-25. Such a decision is not the province of the federal court. Nor was it the subject of the trial.[47] Defendants and City University bear the responsibility for and the freedom of making employment decisions with respect to Department Chairpersons. However, they may not base their decisions on unconstitutional grounds, as they have in the case of Professor Jeffries. Nor may they evade their responsibilities by seeking arbitration in federal court between competing candidates.

Defendants maintain that "the harm that would be done to Professor Gordon should also be weighed against any benefit accruing to the plaintiff." Defendants' Memorandum, at 58. We observe that the reinstatement of Professor Jeffries in no way reflects upon the significant and substantial accomplishments of Professor Gordon in his field, but only reflects upon the irresponsibility of the defendants who made the decision to deny plaintiff his full three-year term on unconstitutional grounds. The Court regrets any inconvenience or hardship to Professor Gordon who apparently had planned on remaining Chairman for one more year.

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[47] Moreover, the Court will not allow defendants to rehash arguments that failed at trial. The jury found, and the Court agreed, that plaintiff's July 20, 1991 speech was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department. Despite this finding, the defendants, in their papers, attempt to relitigate this factual issue before the Court. The Court declines to do so.

Plaintiff has requested injunctive relief sufficiently broad to prevent defendants from creating "shadow sections" (a reference to this Court's decision in the *Levin* case) or their equivalent, including an Institute of Black Studies. *See* Plaintiff's Reply Memorandum, at 9-10. There is, however, insufficient evidence with respect to the defendants' threatened actions and their motives and intentions.[48] Accordingly, the Court declines to award such relief.

Plaintiff also requests that this Court "spell out in full detail the injunctive relief provided to the Plaintiff." Plaintiff's Reply Memorandum, at 9-10. According to plaintiff,

> [t]he requested language is intended to prevent Defendants from employing any ruse to undermine Plaintiff's position and authority as Chair and is intended to secure for the Plaintiff the same protection this Court provided Professor Levin when it recognized and prohibited the effects of the shadow classes established by Defendants in response to Levin's protected speech.

Id. at 9. The Court declines to grant the requested relief. In contrast to the *Levin* case, plaintiff here has presented insufficient evidence upon which to grant broad equitable relief, in effect enjoining the defendants from committing acts which

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[48] In *Levin v. Harleston*, there was overwhelming evidence presented at trial concerning the creation of shadow sections. *See Levin v. Harleston*, 770 F. Supp. at 907-910. In contrast, in this case, there was little evidence at trial concerning the creation of shadow sections, and the circumstances surrounding the creation of the Institute are in dispute. While plaintiff maintains that the Institute is an attempt by defendants to "drain and divert resources from the Black Studies Department and thereby undermine the authority and effectiveness of Plaintiff as Chair . . ." (Plaintiff's Reply Memorandum, at 10), the defendants maintain that the Institute "predated this trial and [is] . . . neither a response to the verdict in this action nor a stratagem to evade its impact" ("Defendants' Memorandum of Law in Opposition to Plaintiff's Application for Injunctive Relief," June 16, 1993, at 7). *See* Roy P. Moskowitz "Affidavit in Opposition to Plaintiff's Request for Injunctive Relief," June 7, 1993. There is insufficient evidence for the Court to discern the motivations of defendants with respect to the Institute.

are wholly speculative and upon which no adequate record was made.

Defendants argue that this Court should deny plaintiff equitable relief because plaintiff "has unreasonably delayed in asserting its rights." Defendants' Memorandum, at 60. Defendants maintain that this delay evinces a lack of interest on the part of plaintiff in regaining his position as Chairman of the Black Studies Department. *Id.* The Court observes that the delay in question, between March 20, 1992 (when plaintiff learned that he would not be able to serve out his full three-year term), and June 5, 1992 (when plaintiff commenced this lawsuit), is only two-and-a-half months. We do not believe that this time period represents in any way an unreasonable delay on the part of plaintiff. Nor does the Court believe that plaintiff's conduct has in any way unreasonably delayed a trial on the merits.

In addition, defendants maintain that plaintiff is not entitled to equitable relief because he comes to the Court with "unclean hands." *Id.* at 61. In support of this argument, the defendants cite to the four incidents mentioned above, in which plaintiff allegedly displayed "grossly inappropriate and irresponsible behavior." *Id.* at 56. The defendants also point out that plaintiff has yet to apologize to the alleged victims of the incidents. The Court does not believe that the four incidents or the lack of apologies rise to a level implicating the doctrine of "unclean hands." *See Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414 (S.D.N.Y. 1980) (". . . the 'unclean hands' doctrine is . . . . a limited device, invoked by a court only when a plaintiff otherwise entitled to relief has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent defendant's tortious conduct." *see* at 435); *Markel v. Scovill Manufacturing Co.*, 471 F. Supp. 1244 (W.D.N.Y.) (". . . the courts are reluctant to apply the unclean hands doctrine in all but the most egregious situations. It will be applied only where some unconscionable act of one coming for relief has immediate and

necessary relation to the equity that he seeks in respect of the matter in litigation." *Id.* at 1255), *aff'd*, 610 F.2d 807 (2d Cir. 1979) (quotes and citations omitted).

The Court is not unmindful of the egregiously offensive and destructive nature of Professor Jeffries' statements, and the widespread dismay and alarm that they have evoked. But we as a society cannot enjoy the freedoms of the first amendment without paying the costs and enduring the burdens of such liberty. Chief among these costs is the fact that a category of viewpoints that a large majority in this nation consider morally reprehensible and racist are also protected by the first amendment. In this case, the derogatory comments of Professor Jeffries with respect to specific ethnic groups would seem to come within the compass of that category. *See Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (First amendment protects right of Nazi party to march through predominantly Jewish town containing many Holocaust survivors); *Brandenberg v. Ohio*, 395 U.S. 444 (1969) (First amendment protects right of Ku Klux Klan leader to make derogatory remarks against Jews and blacks); *Texas v. Johnson*, 491 U.S. 397 (1989) (First amendment protects right of person to burn U.S. flag during protest rally). We are therefore constrained to rule that Professor Jeffries' statements, when spoken outside the classroom, remain under the umbrella of constitutional protection, as long as those statements do not impede the efficient and effective operation of the College or University.

Accordingly, the defendants are required to reinstate the plaintiff as Chairman of the Black Studies Department, for a period of two years effective immediately.

We now turn to the limitations of the injunction with respect to the rights of the University in dealing with any future misconduct by Professor Jeffries. In awarding plaintiff permanent injunctive relief, the Court does not constrain the defendants from removing Professor Jeffries for good cause.[49]

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[49] Good cause might, for example, be incompetence on the part of plaintiff in his classroom teaching, or failure to adequately perform his

The Black Studies Department is not, after all, the personal property or the political fiefdom of plaintiff, and plaintiff's reinstatement is not a permanent license for the plaintiff to hold the position of Chairman of the Black Studies Department or, indeed, it must be emphasized, to hold the position of a tenured professor at CUNY. The defendants retain the full and unqualified right and the responsibility to discipline the plaintiff in response to improprieties or behavior deemed unworthy of a Department Chair or a tenured professor, as long as in so doing the defendants do not violate the United States Constitution. Indeed, there appears to have been some indication, regrettably not developed at the trial, of rather serious improprieties on the part of Professor Jeffries upon which the CUNY administrators could have constitutionally acted.[50] For the most part, however, the University inexplicably and perhaps cowardly, chose to ignore these improprieties, and only acted against the plaintiff when the public outrage over the July 20, 1991 speech in effect forced its hand. We observe, regrettably but necessarily, that the students of CUNY and the people of New York State are entitled to a higher standard of decision-making on the part of its public officials.

We again emphasize that this Order does not preclude the defendants from disciplining Professor Jeffries in response to behavior in class that is deemed incompatible with his duties

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duties as Chairman in a manner consistent with his obligations under the CUNY Bylaws.

[50] For example, as far back as November of 1984, Professor Jeffries made anti-semitic and racist remarks to a candidate interviewing for the position of director of the College's International Studies Program. As a result of the remarks, the candidate withdrew from consideration. In the face of what seems to be totally unacceptable behavior for a Department Chair, the CUNY administrators allowed Professor Jeffries to retain his Chairmanship, only sending him a letter of reprimand. *See* Defendants' Exhibit I, "Report of Inquiry Regarding Allegations Made by Mitchell A. Seligson," dated February 12, 1985; Defendants' Exhibit J, Letter from President Harleston to Professor Jeffries, dated March 8, 1984; Defendants' Exhibit K, Memorandum from President Harleston to Provost Lustig, *et al.*, dated March 8, 1985.

and with the mission and values of the University. Of course, the United States Constitution broadly protects academic freedom. As Justice Brennan wrote in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967):

> . . . the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Id. at 603 (quotation marks and citations omitted). The protection of academic diversity with respect to ideas, perspectives, and their messengers, is a vital concern of the Constitution. *See Dube v. State University of New York*, 900 F.2d at 597-98.

However, the Constitution does not prevent a University from taking disciplinary action against a professor who engages in a systematic pattern of racist, anti-semitic, sexist, and homophobic remarks during class.[51] *See Bishop v. Aronov*, 926 F.2d 1066, 1071-72 (11th Cir. 1991). *See also Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (professor's in class abusive behavior toward students, as well as "[i]ndecent language and profanity [in class] may be regulated in the schools . . ." *Id.* at 585).[52] Such a pattern tends to silence rather than promote the free exchange of ideas, and to destroy rather than enhance academic diversity. Nor does the Constitution protect the right of a professor to teach patently absurd and wholly fallacious theories in class.[53] There is some limited evidence in the record that Professor Jeffries has

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[51] This list is not exhaustive.

[52] *Cf. R.A.V. v. City of St. Paul Minnesota*, 112 S.Ct. 2538 (1992) (First amendment doesn't protect "sexually derogatory 'fighting words' " in employment context. *Id.* at 2546).

[53] For example, the first amendment would not protect the right of a geography professor to teach in class that the earth is flat.

engaged in both of these activities. *See* Defendants' Exhibit F, Letter from Margaret Murphy to Dean Rosen, dated April 1, 1991 (student requests refund of tuition for dropped course; student dropped course in response to inadequate performance of professors, including Professor Jeffries, who among other things, "spouted the most racist line of nonsense," and "sprinkled his lectures with gratuitous sexual references."); Defendants' Exhibit H, Memorandum from Morris Silberberg to President Harleston, dated September, 15, 1988 (attached articles by a student describe theories espoused by Professor Jeffries in class, including theory that white people are genetically inferior "ice" people, and black people are "sun" people). This Order does not require City University to continue to disserve its own students by subjecting them in class to the bigoted statements and absurd theories of any of its professors.

Nevertheless, in his capacity as Chairman of the Department, Professor Jeffries is entitled to the constitutional protection that surrounds his speech and professional activities. While there may have been compelling and legitimate grounds upon which to discipline Professor Jeffries, the University chose to act upon illegitimate and unconstitutional grounds, specifically upon the plaintiff's off-campus July 20, 1991 speech and the publicity surrounding it. Accordingly, the Court found that the defendants violated the first amendment rights of the plaintiff.

Conclusion

The Court grants defendants' motion to set aside, vacate, and overturn the jury verdict on plaintiff's second claim based upon the fourteenth amendment, dismisses that claim as a matter of law, and directs the Clerk of the Court to enter judgment on that claim in favor of the defendants. The defendants' motions with respect to the jury's verdict on the first amendment claim, the defense of qualified immunity, and the punitive damage award are denied, except that the award

against defendant Harleston is reduced from $30,000 to $15,000, and the award against defendant Reynolds is reduced from $50,000 to $25,000. The defendants are hereby mandatorily enjoined to immediately reinstate the plaintiff to the Chairmanship of the Black Studies Department of City College of the City University of New York for a period of two years effective immediately. This injunction explicitly permits the defendants and appropriate officials of City University to initiate removal proceedings with respect to plaintiff's Chairmanship or tenured faculty position for any future conduct that is outside the ambit of constitutional protection as enunciated in this Opinion.

SO ORDERED

Dated: New York, New York
August 4, 1993

KENNETH CONBOY, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 CIV 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

—v.—

BERNARD HARLESTON, *et al.*,

Defendant.

ORDER

KENNETH CONBOY, *District Judge*:

As a preliminary matter, the Court must determine whether the speech at issue in this case, Professor Jeffries' July 20, 1991 speech at the Empire State Black Arts and Cultural Festival, is constitutionally protected. Speech is constitutionally protected if its content is a matter of public concern. Speech touches upon matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 103 S.Ct. at 1690. *See also Johnson v. Lincoln Univ. of Com.*, 776 F.2d 443, 452 (3rd Cir. 1985). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record." *Connick*, 103 S.Ct. at 1690.

Both sides agree that Professor Jeffries' speech, taken in its entirety, touches upon matters of public concern. *See* Transcript of Hearing, April 20, 1993. The Attorney General contends, however, that particular sections of the speech, the

sections that allegedly motivated the defendants' actions, do not touch upon matters of public concern and, therefore, do not deserve constitutional protection.

We reject the Attorney General's contention that the Court can dissect a speech, which both sides concede is constitutionally protected in its entirety, so as to eliminate constitutional protection for particular shards or phrases that might be considered offensive. In *Rankin v. McPherson*, 107 S.Ct. 2891 (1987), the plaintiff, a clerical employee in a county Constable's office, and a co-worker were discussing the policies of the President of the United States. At the conclusion of the discussion, the plaintiff commented upon an assassination attempt against the President, stating, "if they go for him again, I hope they get him." 107 S.Ct. at 2895. Plaintiff's last remark was overheard by another employee, who reported the statement to the Constable. As a result, plaintiff was fired. The Supreme Court found that plaintiff could not be fired for the last remark, because the remark was in the context of a conversation discussing the President and his policies and was, therefore, constitutionally protected. Similarly, in this case, the Court must look to the entire context of the speech to determine whether particular sections touch upon matters of public concern.[1] Because the statements upon which the Attorney General seeks to rely were made in the context of and were part of a speech concerning a matter of public concern, we find that these statements are constitutionally protected.

Having found that Jeffries' speech touches upon matters of public concern, the Court will not allow the Attorney General to splice and fragment the accompanying constitutional protection in a manner that would severely weaken the consti-

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[1] The *Rankin* Court stated that the "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a public concern. '[D]ebate on public issues should be uninhibited, robust, vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " 107 S.Ct. at 2898, *quoting*, *New York Times Co. v. Sullivan*, 84 S.Ct. 710, 721 (1964).

tutional safeguard and might well distort the full, contextual meaning of the speech. Accordingly, the Court finds that Jeffries' whole speech, each and every sentence, is constitutionally protected. *See Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 3263 (1987) ("The task under *Pickering* is to balance those competing interests and to determine whether the employee's interests in the *speech as a whole* outweigh the public employer's interests." *Id.* at 957 n.6) (emphasis added); *Moore v. City of Kilgore, Tex.*, 877 F.2d 364 (5th Cir.), *cert. denied*, 110 S.Ct. 562 (1989) ("Finally, we turn to an analysis of the form of Moore's comments. They do involve a hint of personal 'employee' considerations . . . . However, mixed motivations are involved in most actions we perform everyday; we will not hold Moore to herculean standards of purity of thought and speech, ever assuming Moore's motivations were mixed. Taking Moore's *speech as a whole*, and considering the content, context, and form together, we hold that Moore's speech does involve a matter of public concern—the effectiveness of the Fire Department in fighting fires." *Id.* at 371-72) (emphasis added); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) ("The use of profane words by themselves, in my opinion, does not preclude a finding that an employee's speech addresses a matter of public concern. Instead, as *Connick* indicates, the record *as a whole* must be examined. *Martin v. Parrish*, 805 F.2d at 587 (Concurrence)) (emphasis in original).

The Attorney General next urges that the defendants be permitted to offer testimony to the jury that they were in fact motivated in the actions they took only by the assertedly anti-semitic portions of the speech. We observe parenthetically that in taking this position the defendants may be conceding a part of the plaintiff's burden of proof—specifically, that the protected speech was a substantial or motivating factor in the defendants' actions. *See Johnson v. Lincoln Univ. of Com.*, 776 F.2d 443, 452 (3rd Cir. 1985).

The Court will allow the admission of evidence concerning the particular sections of the speech that motivated defendants' actions. However, both sides should be aware that the fact that the defendants were motivated by only particular sections of the speech is in no way a defense to the civil allegations. It is our present intent to instruct the jury accordingly.

SO ORDERED.

KENNETH CONBOY, U.S.D.J.

Dated: New York, New York
April 21, 1993

VERDICT FORM #1

JEFFRIES V. HARLESTON, *ET AL.*, 92 Civ. 4180 (KC)

1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

*(If you answer "no" to question #1, proceed to question #5. If you answer "yes" to question #1, proceed to question #2.)

2. Have the defendants shown by a preponderance of the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and efficient operation of the Black Studies Department, the College, or the University?

yes _____ no __x__

4. If the answer to question #3 was "no," have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University?

yes __x__ no _____

5. Has the plaintiff proven by a preponderance of the evidence that the defendants deprived him of property without due process of law?

yes __x__ no _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

92 CIV 4180 (KC)

LEONARD JEFFRIES,

Plaintiff,

—v.—

BERNARD HARLESTON, *et al.*,

Defendants.

ORDER

KENNETH CONBOY, *District Judge*:

This trial commenced on April 22, 1993, and the jury submitted its initial verdict on May 10, 1993. There were five questions on the First Verdict Form, which the jury answered as follows:

1. Has the plaintiff proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech in Albany was a substantial or motivating factor in the denial of plaintiff's three-year term as Chairman of the Black Studies Department? "Yes."

2. Have the defendants shown by a preponderance of the evidence that Leonard Jeffries would have been denied a full three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech? "No."

3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered

the effective and efficient operation of the Black Studies Department, the College, or the University? "No."

4. If the answer to question #3 was "no," have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University? "Yes."

5. Has the plaintiff proven by a preponderance of the evidence that the defendants deprived him of property without due process of law? "Yes."

To begin, the Court notes that the jury found that the defendants violated the plaintiff's rights under the fourteenth amendment, in that they deprived the plaintiff of property without due process of law.

Having received the determinations of the jury with respect to the factual issues underlying the first amendment allegations, the Court must now balance the interests of the plaintiff Leonard Jeffries "in commenting upon matters of public concern," against the interests of his employer, City University, "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Ed. of Tp. H. S. Dist. 205, Ill.*, 391 U.S. 563, 568 (1968).

In performing this balancing test, the Court must determine the degree to which Professor Jeffries' July 20, 1991 speech involved matters of public concern. In making this determination, the Court looks to the "content, form, and context of a given statement as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Professor Jeffries made his speech at the Empire State Black Arts and Cultural Festival in Albany, New York, in a function that was wholly unconnected with City University. The speech was made in response to and as part of an ongoing debate concerning the importance of teaching different perspectives in the classrooms of this country. The subject of the debate and the con-

tent of the speech concerned the reform of the educational curriculum to reflect the multicultural values and experiences of different minorities in the United States. In fact, Professor Jeffries had been retained by the State of New York to advise a task force appointed by New York State Education Commissioner, Thomas Sobol, to study the status of the curriculum in the state's public schools and the treatment of people of color in that curriculum (*See* Plaintiff's "Affidavit in Support of Plaintiff's Motion for Summary Judgment," para. 7). Professor Jeffries was given the task of researching the impact of the public school curriculum on African Americans. Following publication of the task force's findings, a storm of controversy broke over the participants, who then proceeded to attack each other. The ensuing debate absorbed the energies of the press and commentators on the American scene, across the nation. Indeed, in his speech, Professor Jeffries responds to criticisms that had been leveled at him and his ideas by others in both academic and political life.

Reviewing the record with respect to Professor Jeffries' July 20, 1991 speech, the Court finds that the speech substantially involved matters of public concern and "should be accorded significant weight in the *Pickering* balance." *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149, 1157 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991). The speech was part of a debate that has broad and extremely significant implications for American society. Possible reform of the educational curriculum, and the introduction of multicultural perspectives in the classroom, to whatever degree thought prudent, represent a critical dialogue that reaches the deepest political and social values of the United States. While it is quite understandable that some may consider certain statements in Professor Jeffries' speech to be offensive, these statements do not dilute the high degree of public concern that is at the core of the speech.

On the other side of the scale, the Court must weigh the right of the University to function effectively and efficiently. In weighing this right, the Court defers to the jury's factual

findings. The jury found that Professor Jeffries' July 20, 1991 speech did not hamper the effective and efficient operation of the Black Studies Department, the College, or the University. However, the jury also found that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's speech would cause the disruption of the effective and efficient operation of the Black Studies Department, the College, or the University.[1] The question facing the Court is whether the defendants, in order to outweigh the free speech rights of the plaintiff, must show actual hampering of the effective and efficient operation of the Black Studies Department, the College, or the University, or whether the "reasonable expectation" that the plaintiff's speech would cause disruption is enough to overcome the plaintiff's first amendment rights. We recognize that in *Connick* the Supreme Court stated that it did "not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152. However, the Supreme Court cautioned "that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.*

Many courts since *Connick* have held that where a public employee's speech substantially involves matters of public concern, the defendants must show *actual* hampering of the effective and efficient operation of the governmental services in order to outweigh the employee's first amendment rights. A showing that the defendants were motivated in their actions by a "reasonable expectation" that the employee's speech

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[1] We observe that at least one Circuit court has held that in performing the balancing test required by *Pickering* a "court must defer to [the jury's] factual findings, unless the[ ] [findings] are totally unsupported by the record." *Lewis v. Harrison School District No. 1*, 805 F.2d 310, 315 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987). However, the authority is unclear in this Circuit as to the obligation of trial courts to make factual determinations when balancing the *Pickering* factors. Accordingly, we have made an independent review of the evidence in this case, and we agree with the jury's factual findings.

would cause the disruption of the effective and efficient operation of the government office is insufficient. *See, e.g., Piesco*, 933 F.2d at 1159-60; *Melton v. City of Oklahoma City*, 879 F.2d 706, 715-16 (10th Cir. 1989); *Roth v. Veteran's Admin. of Government of United States*, 856 F.2d 1401, 1407 (9th Cir. 1988); *Matherne v. Wilson*, 851 F.2d 752, 761 n.53 (5th Cir. 1988); *Zamboni v. Stamler*, 847 F.2d 73, 78 (3rd Cir.), *cert. denied*, 488 U.S. 899 (1988).

Because the jury found no actual hampering and because we have found that the plaintiff's speech substantially involved matters of public concern, we hold that the plaintiff's interest in making his speech outweighs the University's interest in the effective and efficient operation of its services. Accordingly, the Court finds that the University's denial to Professor Jeffries of a full three-year term as Chairman of the Black Studies Department constitutes a violation of plaintiff's first amendment rights.

We will, therefore, submit the first amendment claim with the fourteenth amendment claim to the jury for further deliberations on the questions of individual on liability and punitive damages.

SO ORDERED

KENNETH CONBOY, U.S.D.J.

Dated: New York, New York
May 11, 1993

VERDICT FORM #2—INDIVIDUAL LIABILITY

JEFFRIES V. HARLESTON, *ET AL.*, 92 Civ. 4180 (KC)

1. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in BERNARD W. HARLESTON's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

2. If the answer to question #1 is "yes," do you find that BERNARD W. HARLESTON has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

3. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was substantial or motivating factor in W. ANN REYNOLD'S actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

4. If the answer to question #3 is "yes," do you find that W. ANN REYNOLDS has shown by a preponderance of the evidence that she would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

5. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in JAMES P. MURPHY's actions

with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

6. If the answer to question #5 is "yes," do you find that JAMES P. MURPHY has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

7. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in EDITH P. (sic) EVERETT's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

8. If the answer to question #7 is "yes," do you find that EDITH B. EVERETT has shown by a preponderance of the evidence that she would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

9. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in HERMAN BADILLO's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

10. If the answer to question #9 is "yes," do you find that HERMAN BADILLO has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as

Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

11. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in SYLVIA BLOOM's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

12. If the answer to question #11 is "yes," do you find that SYLVIA BLOOM has shown by a preponderance of the evidence that she would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

13. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in GLADYS CARRION's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

14. If the answer to question #13 is "yes," do you find that GLADYS CARRION has shown by a preponderance of the evidence that she would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

15. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in LOUIS C. CENCI's actions

with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

16. If the answer to question #15 is "yes," do you find that LOUIS C. CENCI has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

17. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in MICHAEL J. DEL GUIDICE's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

18. If the answer to question #17 is "yes," do you find that MICHAEL J. DEL GUIDICE has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

19. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in STANLEY FINK's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

20. If the answer to question #19 is "yes," do you find that STANLEY FINK has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the

Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

21. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in WILLIAM R. HOWARD's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

22. If the answer to question #21 is "yes," do you find that WILLIAM R. HOWARD has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

23. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in HAROLD M. JACOBS' actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes __x__ no _____

24. If the answer to question #23 is "yes," do you find that HAROLD M. JACOBS has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no __x__

25. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in SUSAN MOORE MOUNER's

actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

26. If the answer to question #25 is "yes," do you find that SUSAN MOORE MOUNER has shown by a preponderance of the evidence that she would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991, speech?

yes _____ no _____

27. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in CALVIN O. PRESSLEY's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

28. If the answer to question #27 is "yes," do you find that CALVIN O. PRESSLEY has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

29. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's July 20, 1991 speech was a substantial or motivating factor in THOMAS TAM's actions with respect to the denial to the plaintiff of a three-year term as Chairman of the Black Studies Department?

yes _____ no __x__

30. If the answer to question #29 is "yes," do you find that THOMAS TAM has shown by a preponderance of the evidence that he would have taken the same actions with respect to the denial of plaintiff's three-year term as Chairman of the

Black Studies Department even had Jeffries not made his July 20, 1991 speech?

yes _____ no _____

31. Has the plaintiff proven by a preponderance of the evidence that the defendant BERNARD W. HARLESTON intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes __x__ no _____

32. Has the plaintiff proven by a preponderance of the evidence that the defendant W. ANN REYNOLDS intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes __x__ no _____

33. Has the plaintiff proven by a preponderance of the evidence that the defendant JAMES P. MURPHY intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

34. Has the plaintiff proven by a preponderance of the evidence that the defendant EDITH B. EVERETT intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

35. Has the plaintiff proven by a preponderance of the evidence that the defendant HERMAN BADILLO intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

36. Has the plaintiff proven by a preponderance of the evidence that the defendant SYLVIA BLOOM intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

37. Has the plaintiff proven by a preponderance of the evidence that the defendant GLADYS CARRION intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

38. Has the plaintiff proven by a preponderance of the evidence that the defendant LOUIS C. CENCI intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

39. Has the plaintiff proven by a preponderance of the evidence that the defendant MICHAEL J. DEL GUIDICE intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

40. Has the plaintiff proven by a preponderance of the evidence that the defendant STANLEY FINK intended, recklessly participated in, or was deliberately indifferent to the deprivation of the plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

41. Has the plaintiff proven by a preponderance of the evidence that the defendant WILLIAM R. HOWARD intended, recklessly participated in, or was deliberately indifferent to

the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

42. Has the plaintiff proven by a preponderance of the evidence that the defendant HAROLD M. JACOBS intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

43. Has the plaintiff proven by a preponderance of the evidence that the defendant SUSAN MOORE MOUNER intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

44. Has the plaintiff proven by a preponderance of the evidence that the defendant CALVIN O. PRESSLEY intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

45. Has the plaintiff proven by a preponderance of the evidence that the defendant THOMAS TAM intended, recklessly participated in, or was deliberately indifferent to the deprivation of plaintiff's property without due process of law under the fourteenth amendment?

yes _____ no __x__

VERDICT FORM #3—PUNITIVE DAMAGES

JEFFRIES v. HARLESTON, *ET AL.*, 92 Civ. 4180 (KC)

1. Do you find that the plaintiff has proven by a preponderance of the evidence that BERNARD W. HARLESTON acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that BERNARD W. HARLESTON acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

2. Do you find that the plaintiff has proven by preponderance of the evidence that BERNARD W. HARLESTON acted with malicious intent to deprive the plaintiff of property without due process of law or with malicious intent to unlawfully injure him or that BERNARD W. HARLESTON acted with a callous or reckless disregard of the plaintiff's right not to be deprived of property without due process of law?

yes __x__ no _____

3. If the answer to question #1 or #2 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against BERNARD W. HARLESTON, what is the appropriate amount?

$30,000.00

4. Do you find that the plaintiff has proven by a preponderance of the evidence that W. ANN REYNOLDS acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that W. ANN REYNOLDS acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

5. Do you find that the plaintiff has proven by a preponderance of the evidence that W. ANN REYNOLDS acted with malicious intent to deprive the plaintiff of property without due process of law or with malicious intent to unlawfully injure him or that W. ANN REYNOLDS acted with a callous or reckless disregard of the plaintiff's right not to be deprived of property without due process of law?

yes __x__ no _____

6. If the answer to question #4 or #5 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against W. ANN REYNOLDS, what is the appropriate amount?

$50,000.00

7. Do you find that the plaintiff has proven by a preponderance of the evidence that EDITH B. EVERETT acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that EDITH B. EVERETT acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

8. If the answer to question #7 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against EDITH B. EVERETT, what is the appropriate amount?

$80,000.00

9. Do you find that the plaintiff has proven by a preponderance of the evidence that HERMAN BADILLO acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that HERMAN BADILLO acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

10. If the answer to question #9 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against HERMAN BADILLO, what is the appropriate amount?

$80,000.00

11. Do you find that the plaintiff has proven by a preponderance of the evidence that SYLVIA BLOOM acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that SYLVIA BLOOM acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

12. If the answer to question #11 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against SYLVIA BLOOM, what is the appropriate amount?

$80,000.00

13. Do you find that the plaintiff has proven by a preponderance of the evidence that HAROLD M. JACOBS acted with malicious intent to violate the plaintiff's rights under the first amendment of the United States Constitution or with malicious intent to unlawfully injure him or that HAROLD M. JACOBS acted with a callous or reckless disregard of the plaintiff's first amendment rights?

yes __x__ no _____

14. If the answer to question #13 is "yes," you may decide to award punitive damages, or you may decide not to award them. If you decide to award punitive damages against HAROLD M. JACOBS, what is the appropriate amount?

$80,000.00

EXCERPTS FROM THE RECORD BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Excerpts from Defendants Ex. B

THE CITY COLLEGE
OF

THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK. 10031

OFFICE OF THE
VICE PRESIDENT FOR ACADEMIC AFFAIRS (212) 690-6638
AND PROVOST

CONFIDENTIAL

August 14, 1991

President Bernard W. Harleston
The City College

Dear Bernie:

I have consulted with several people on the City College campus and at 80th Street about alternative actions regarding Professor Leonard Jeffries Jr.'s position as Chair of the Black Studies Department. To determine the legal procedures governed by the University's Bylaws, I spoke with Dean Silberberg and Vice Chancellor Bloom who has allowed me to append his confidential memo to the Chancellor (August 8, 1991). Vice Chancellor Diaz indicated that his previous memo to you Re: Free Speech of Public Employees, is applicable in this case and it is also appended. In addition, I met with Deans Arons (since he was a member of the Committee that reported to you on Professors Levin and Jeffries) and Rosen to discuss possible scenarios and the internal and external

repercussions associated with them. I have also been in touch with Professor de Jongh and he has contacted other faculty about the current situation and will convene the Executive Committee of the Faculty Senate on Monday, August 19th to view the entire video-tape. Professor de Jongh has already viewed the video-tape and does not think Jeffries' remarks were so outrageous as to be sufficient cause for his removal as department chair.

It is agreed that the most severe censure of Professor Jeffries should be limited to removing him as the Chair of the Black Studies Department. No one I spoke with believes that a tenure action against him would be an appropriate response nor would it be in the best interest of the College. The basis for removal as Chair would stem from Article IX of the Bylaws, "Organization and Duties of Faculty Departments". In article 9.1c it states that "In any case where the president does not approve the election of a chairman, or at such other time as the interests of the college may require the removal of a chairman and the appointment of a new one, he/she shall confer with the department . . . . . The president shall base his/her recommendation (for the new chair) on the capacity of the individual selected to act effectively as the departmental administrator and spokesman and as a *participant in the formation, development and interpretation of college-wide interest and policy.*" (Parenthesis and italics are mine).

Given that a department chair holds a position which is defined, in part, as administrative and policy-making, you have grounds for initiating Jeffries' removal. For example, your memo of August 8, 1991 to the College community states, "attitudes and values that denigrate individuals and groups have no place at City College". (See attached). In addition, in 1985 Jeffries was connected with racist and anti-semitic remarks in conjunction with the search for the Director of the International Studies Program. At that time, you indicated to Professor Jeffries and stated in a March 8, 1985 memo that:

> "such comments and remarks, whether intended or not, are intolerable and indefensible for individuals charged with officially representing the College, or for individuals functioning in a role such as Department Chair, which makes them representatives of the College.
>
> There is no place at City College for racism, anti-semitism, ethnic snobbism, or any other attitude that denies equality among individuals. Those who are appointed or elected to leadership positions in the College have an added responsibility to insure that attitudes and values that deny equality among individuals are neither directly nor indirectly supported or reinforced. This is a necessary condition for responsible administrative leadership at City College.
>
> I want to state unequivocally for the future that The City College will not accept in a leadership role any individual whose official actions or statements create the perception that this College supports racial or ethnic bigotry."

An alternative and less punitive reaction to the Jeffries situation would be to vigorously condemn his comments while supporting the principles of academic freedom. In this case, it would be necessary that a variety of groups (the Faculty Council, Faculty Senate, Review Committee, etc.) censure Jeffries and state their outrage, while declaring that academic freedom protects him from dismissal as chair. Perhaps if not threatened with removal Jeffries will rephrase or soften his comments. However, it is not expected that he will apologize or retract substantive sections of his speech.

These are the expected repercussions of these two scenarios.

Scenario I—*Removal As Chairperson*

1. Department reaction: the faculty reluctantly meets with you as mandated in the bylaws; they pledge full support for

Jeffries and indicate that they refuse to have an acting chair. (Professor Jeffries is given the opportunity to resign before the President acts to recommend his removal as chairperson. Either you or the Chair of the Faculty Senate should convey this option to him).

2. City College faculty reaction: some/many faculty (both liberal and conservative) condemn Jeffries' remarks, but also condemn interference by the administration to remove the chair. Academic freedom is held to be a more important principle than punishment of a particular faculty member for offensive comments.

3. Professor Jeffries institutes legal action against the College. Although this will be time consuming, there is little chance he would win.

4. Jeffries' supporters mobilize students to create unrest on the campus. Dean Rosen believes that these disruptions could last the entire academic year.

5. Jeffries is seen as a martyr in some circles and becomes increasingly celebrated.

6. Alumni are mollified by the removal of Jeffries as chair and some alumni pledges are restored.

7. The Press, 80th Street, the Governor, Senator D'Amato and other political leaders are pleased that action has been taken against Jeffries, but they do not provide additional support for the College.

8. It may be very difficult to find someone to assume the position of Acting Chair. Someone from outside the Department may have to be assigned to serve as chair, or the Dean may have to serve in this capacity.

9. The search for a Black Studies faculty member is redirected to find a candidate suitable to assume the position of department chair.

Scenario II—*Condemnation of Jeffries*

1. Department reaction: the faculty reluctantly meets with you and declares its full support for Jeffries. You indicate that you have requested various groups in the College community to investigate the situation and make recommendations to you.

2. City College faculty almost unanimously condemns Jeffries' remarks. Resolutions are passed by the Council, Senate and the Review Committee against Jeffries, but advocate the importance of the principles of academic freedom and free speech as crucial to the free exchange of ideas at a university. Some faculty accuse the Administration of being too weak.

3. Alumni continue to be angered by lack of action. City College Fund money drops precipitously. Increased visits by College administrators and faculty to alumni meetings throughout the nation are scheduled to explain the principles which have led to this position.

4. The Press, 80th Street, the Governor, Senator D'Amato and other political leaders indicate that the College should have taken more decisive action against Jeffries.

5. We ask Professor Brooks to offer a session in the November 1991 *Conference on Race and Other Differences* about the Jeffries situation. The College invites alumni and other scholars to take part in the session.

6. The search for a Black Studies faculty member is redirected to find a candidate suitable to assume the position of department chair.

7. Professor Jeffries is asked to consider rescinding or modifying his remarks; he probably will not do so.

8. Professor Jeffries appears to escape substantive retaliation for his racist and anti-Semitic remarks.

Based upon the two scenarios, it appears that there may be more internal negative reaction to Scenario I and greater external negative reaction to Scenario II. In either case, there will be negative reactions to anything that we do. Unfortunately, this appears to be a no win situation for us, particularly in the current climate of racial tension and lack of tolerance throughout New York City, as well as the severe budget crisis facing the City and State.

However, it is imperative that the administration move quickly to react to the Jeffries statements. As soon as possible you should convene a meeting with the Black Studies Department and meet with the Executive Committee of the Faculty Senate and Faculty Council to gather opinions. In addition, it may be advisable to form a new ad-hoc committee, reconstitute the Roellig Committee and/or request that standing committees of the Senate and the Commission on Pluralism and Diversity investigate grounds for further administrative action. The assigned bodies must be called into action during the first week in September and charged to report back to you no later than the end of September. It may also be in our best interest to get a group of alumni and community leaders to investigate the situation and make separate reports.

I believe that it is best to maintain an open mind about what steps should be taken until the reports are made by the various committees. However, it appears clear that there is no easy political solution that can be attained. Given this reality, I want to emphasize that the final decision about Jeffries should be based upon principle rather than internal or external pressure.

Sincerely,

/s/
Robert Pfeffer
Provost

3 attachments

* * *

THE CITY COLLEGE
OF

THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK 10031

OFFICE OF THE PRESIDENT

August 8, 1991

Dear Colleague:

Earlier in my presidency, I released a statement to the City College community in which I stated that "there is no place at City College for racism, anti-semitism, ethnic snobbism or any other attitude that denies equality among individuals."

Once again, I reaffirm this position in the light of the controversy surrounding Dr. Leonard Jeffries' most recent remarks. Professor Leonard Jeffries' speech at the Empire State Black Arts and Cultural Festival in Albany, unfortunately, contained clear statements of bigotry and anti-semitism. While these remarks were made at an event unrelated to the College, they nonetheless undermine our determination to maintain an environment characterized by civility and mutual respect, and free of racial, religious and ethnic conflict.

As the President of this College, it is my responsibility to assure the College community that attitudes and values that denigrate individuals and groups have no place at City College. Certainly, we must insure the right of our faculty and students to express their ideas, both in and outside of the classroom, without fear of institutional censorship. However, the right to free expression and, indeed, to academic freedom is not and cannot be absolute. With freedom must come accountability.

I, therefore, would like to reassure you that at the beginning of the Fall semester, I will initiate a thorough review of this situation. This review will be conducted in consultation with faculty and staff, and will follow a procedure that respects the principles of academic freedom and assures due process.

Sincerely,

/s/
Bernard W. Harleston

Defendants Ex. C

CITY COLLEGE OF NEW YORK
DIVISION OF SOCIAL SCIENCES
NAC 6/141 650-8155/8156

TO:

FROM: Jeffrey Rosen, Dean
Division of Social Sciences

DATE:

RE:

COMMENTS

My Dear Dean:

I just learned from a student who overheard Morris Silver tell another professor that they are going after the Black Studies Department checking on every thing and everyone starting with Prof. Scobie.

(over)

I am sending a notice officially to him, you, the Provost and the President that if this faculty wants war it will get it—enough is enough. We will fight fire with fire.

Sd/ Len

Defendants Ex. E

August 31, 1991

Dear Professor Jeffries,

Because my wife and I were abroad until a few days ago, I didn't hear of your recent performance in Albany until my return.

I have now viewed a videotape of it and find your pervasive anti-Semitism one of the most repugnant things I have ever been exposed to. (When I was younger I heard Adolph Hitler and Father Coughlin, to mention a few, so others have been worse.) You used the putative Jewishness of a name to indicate that a person is intrinsically evil. You referred to me as 'head-Jew', a verbalization which, again, would be used only by an overt anti-Semite. You then proceeded to quote me as saying, "Everyone knows rich Jews participated in the slave trade," a statement I would be incapable of making.

You have many amends to make for this ugly, vicious and danger-laden performance, and you certainly owe me an apology for publicly attributing to me a statement you made up out of the whole cloth.

Yours,

/s/
Bernard Sohmer
Professor, Mathematics

Excerpts from Defendants Ex. I CONFIDENTIAL

REPORT OF INQUIRY REGARDING
ALLEGATIONS MADE BY MITCHELL A. SELIGSON

Pursuant to a request made by President Harleston I have conducted an inquiry regarding certain allegations made by

Professor Mitchell A. Seligson of Arizona University. Prof. Seligson visited the College on November 26 and 27, 1984 as part of the last stages of the search for a director of the College's International Studies Program. He was one of three people who visited us at about that time for this purpose. Professor Seligson met with the President, the Provost, the acting Dean of Social Science, the Executive Committee of the Political Science Department, and with members of both the Executive Committee of the International Studies Program and the Advisory Committee of the International Studies Committee. He also gave a talk jointly sponsored by the International Studies Program and the Political Science Department. There was a luncheon on each of the days he visited with us. (See Appendix A.)

On December 19, 1984 President Harleston received a letter from Prof. Seligson written on December 15th (with copies sent to the Provost, the acting Dean of Social Science, and the Chairperson of the Political Science Department) in which he indicated that he was withdrawing from the search and stating the reasons for his withdrawal. He wrote:

> You are probably unaware of the treatment to which I was subjected during some of my interviews. On two occasions, one public and the other private, patently racist and anti-semitic remarks were made to me. You personally were accused of being no more than a "tool" of White Jewish power brokers subject to manipulation by Provost Harry Lustig. Lustig himself was attacked as an individual who was only seeking to "clone" himself at City. I also found that even minimal notions of academic freedom were disregarded, as individuals attempted to apply a "litmus test" to my political beliefs. I was publically (sic) told that the entire job selection process was illegitimate and would not be allowed to be concluded successfully, because no Blacks were on the "short list," even though at least one

> Black had applied. I subsequently learned that that applicant did not have a Ph.D., or other credentials consistent with a senior professorial appointment.

Professor Seligson called me on the day that he mailed his letter to President Harleston and read the letter to me over the telephone. During this conversation he identified the individual who had made the remarks referred to in the above paragraph from his letter as Professor Leonard Jeffries, the Chairman of the Black Studies Department, and indicated that the remarks had been made at the luncheon on November 26. When I asked him why he had not identified Prof. Jeffries in his letter, Prof. Seligson responded that he did not wish to enter into the matter on that level, that the intent of his letter was simply to explain why he had withdrawn himself from the search. In a subsequent telephone conversation with Provost Lustig, Prof. Seligson once again indicated that the maker of the remarks referred to in his letter was Prof. Jeffries. On February 2, 1985 I called Prof. Seligson at the President's request and asked him if he would be willing to send the President a letter identifying Prof. Jeffries as the individual who had made the remarks in question. Although he again identified Prof. Jeffries as the one who had made these remarks he indicated that he was not sure that he would send such a letter and would have to consider the matter. He expressed concern about becoming involved in a time consuming legal suit and indicated that we had more than enough witnesses to identify Prof. Jeffries as the individual who had made the remarks. I have not heard from Prof. Seligson again.

The following members of the faculty were present as the luncheon with Prof. Seligson on November 26: Professors Elizabeth Starcevic, Sherrie Baver, Mitchell Kellman, Frank Grande, Leonard Jeffries, and Dean Martin Tamny. I individually interviewed Professors Starcevic, Baver, Kellman, and Grande on February 4, 1985. During my meetings with each of these faculty members I indicated that I was carrying out this inquiry at President Harleston's request. I then read

the paragraph from Prof. Seligson's letter quoted above and asked for their recollections regarding these allegations; had they heard these remarks, where, when, who had made them, etc. All of the above indicated that Professor Leonard Jeffries had made the remarks mentioned in the above paragraph from Prof. Seligson's letter at the luncheon on November 26. I can report here that I too heard those remarks made by Prof. Jeffries on that occasion. I asked in each case what they took to be Prof. Jeffries intentions, if any, in making these remarks. Everyone I interviewed that had been present at the luncheon concluded that Prof. Jeffries' intent in making those remarks was to get the candidate to withdraw or to refuse an offer of the position should it be made. In several cases it was noted that Prof. Jeffries had made similar remarks to Prof. Siegel, another candidate for the position, but had not made them to Prof. Isaacman, a third candidate. This was viewed as support for the view that Prof. Jeffries was trying to insure Prof. Isaacman's success or at least attempting to insure the failure of Professors Seligson and Siegel. The individual reports made by these faculty members can be found in Appendix B. I concur in their judgment regarding Prof. Jeffries' intentions. I spoke to the Provost soon after the luncheon and expressed to him my concern that Prof. Jeffries was attempting to undermine the search process.

I have also met with Professors Frank Laraque, Jean Weisman, Carol Smith, and Joyce Gelb regarding other aspects of the interviewing process such as Prof. Seligson's talk and his meeting with the Political Science Executive Committee and the Executive and Advisory Committees of the International Studies Program. None of them could recollect any incidents that could be viewed as violations of academic freedom. Prof. Seligson was pressed hard by the students who were present at his talk, but this was regarded as being part of "The City College tradition" by those I interviewed who were present. At Prof. Seligson's interview with the Advisory Committee questions were raised concerning his willingness to seek funding from various government agen-

cies. Those I interviewed regarded such questions as legitimate in the context of an appointment of a director of an International Studies program with a special emphasis on Third World problems.

This inquiry has been complicated by several factors that should be made clear. Prof. Seligson's letter to President Harleston has been reproduced and sent to various members of the faculty, the press, and Prof. Seligson's publisher (I was so informed by Prof. Seligson in our telephone conversation of February 2). Its distribution may well have gone further than that. I have not been able to determine how this came about. I do know that Prof. Gelb made copies of the copy sent her by Prof. Seligson and distributed it among the members of her department for the purpose of discussion at a department meeting. I surmise that a member of her department is the source of the further distribution of the letter. Several individuals who have seen the letter have approached me wanting to know what the "administration was going to do about this situation. I told them that the matter was being looked into and that when the facts were ascertained any appropriate actions warranted would be taken. In one case I was told that the entire matter would be taken to the press, and in that case I revealed that I had been asked to carry out this inquiry and that a report would be going to the President by February 14th and that given this fact any claim that nothing was being done about the matter was false.

Conclusion

As a result of my inquiry I have concluded that Prof. Jeffries did make the remarks referred to in the third paragraph of Prof. Seligson's letter. Despite the fact that Prof. Seligson has not named Prof. Jeffries in writing he has done so in telephone conversations with me and with the Provost. All those present at the luncheon of November 26, 1984 (other than Prof. Jeffries) have been asked if the remarks were made and by whom and all have said that they were made by Prof.

Leonard Jeffries. Although the question of intention is always somewhat problematic, in this case all those interviewed had reached the same conclusion regarding Prof. Jeffries' reason for making these remarks, and that was that he was attempting to get Prof. Seligson to either withdraw from the search or to refuse an offer should it be made.

With respect to Prof. Seligson's other charge regarding violations of his academic freedom in the application of a "litmus test" to his political beliefs, I find that the zeal and enthusiasm of our students and some of our faculty have probably been misinterpreted by Prof. Seligson. Nothing that occurred in this regard seems to have been motivated by anything more than interest in his remarks and the concern that any director of the Program not have covert government connections. I do not believe, from what I have heard from those who were present, that there was any intention of accusing Prof. Seligson of being so connected, or any belief that he was so connected. In any case, any violation of academic freedom that could take place in this instance would occur at the time a judgment was being rendered as to whether or not Prof. Seligson would be a suitable candidate for director. To my knowledge no such violation took place. Thus I find these allegations of violation of academic freedom to be unfounded.

Recommendations

Although I was not explicitly asked to make recommendations the seriousness of what has occurred and the responsibilities of my position as acting Dean of the Social Science Division require that I do so. In my view the actions of Professor Leonard Jeffries in this case demonstrate that he does not have the judgment and moral responsibility required of the chairman of an academic department at an institution such as The City College. I therefore recommend that the President remove him as chairman of the Black Studies Department and either appoint a new chairman or ask that an election take place to elect a replacement.

It has been suggested to me that Prof. Jeffries' intentions in making these remarks are central to a determination of his culpability. I would like to assert here that although his intentions may be relevant to some questions of degree of guilt they are irrelevant to the question of his ability to serve as chairman. Whether he could make such remarks "frivolously" without regard for their consequences, or with the intention of subverting the search is irrelevant insofar as it is clear that anyone capable of either action is unfit to be chairman.

Respectfully submitted by,

/s/
Martin Tamny,
Acting Dean of Social Science
February 12, 1985

* * *

APPENDIX C

DEC 19, 1984

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

DEPARTMENT OF POLITICAL SCIENCE
315 SOCIAL SCIENCES TEL. (602) 621-7600

December 15, 1984

Bernard W. Harleston, President
Administration Building
The City College
Convent Avenue at 138th Street
New York, NY 10031

Dear President Harleston:

Since my interview at City College for the position of Director of International Studies I have been traveling exten-

sively and only over the past few days have had the opportunity to discuss with my family my impressions. As I noted during the interview, my wife and I are both from New York, both graduates of Brooklyn College, and retain a strong personal tie to New York City. That consideration, along with the opportunity to build a quality program in international studies, I have had to weigh against leaving a major research university, with its extensive libraries, graduate programs, reduced teaching loads, research funding and research assistance.

All other things being equal, I cannot honestly say what decision I would have made between the two settings if I had placed myself in a position to choose. However, there was a series of unfortunate incidents that emerged during the course of the second round of interviews, which have radically altered the balance.

You are probably unaware of the treatment to which I was subjected during some of my interviews. On two occasions, one public and the other private, patently racist and anti-semitic remarks were made to me. You personally were accused of being no more than a "tool" of White Jewish power brokers subject to manipulation by Provost Harry Lustig. Lustig himself was attacked as an individual who was only seeking to "clone" himself at City. I also found that even minimal notions of academic freedom were disregarded, as individuals attempted to apply a "litmus test" to my political beliefs. I was publically (sic) told that the entire job selection process was illegitimate and would not be allowed to be concluded successfully, because no Blacks were on the "short list," even though at least one Black had applied. I subsequently learned that that applicant did not have a Ph.D., or other credentials consistent with a senior professorial appointment.

While I feel confident that I can stand up to attacks of that nature, I have been forced to conclude that any efforts that I would make to obtain funding for the Program would be jeop-

ardized by what seemed to me to be a paranoid distrust of some of the major sources of government funding, such as the United States Information Agency and the Agency for International Development. Sadly those who expressed their deepest mistrust of these government agencies did not even seem to understand their functions and confused them with intelligence agencies. I do not have, nor have I ever had, any connection, direct or indirect with any intelligence agency of our government or of any other government.

In sum, my family and I feel that it would best if my name were withdrawn from further consideration. The kinds of assurances that I would need in order for me to function effectively in the position are, no doubt, beyond that which could be given under the circumstances.

Colleges and universities in this country are places where we strive to dispell (sic) the darkness, not propagate it. City College historically has been one of our great institutions of higher learning. If forces of darkness are allowed to go unchallenged at City, then the institution will suffer irreparable damage.

Sincerely,

/s/
Mitchell A. Seligson
Associate Professor (on leave) and
International Relations Fellow, Rockefeller Foundation

Current address: 400 N. River Road (#1312)
W. Lafayette, IN 47906
Phone: (317) 743-1149

cc: Harry Lustig, Provost
Martin Tamny, Acting Dean of Social Science
Joyce Gelb, Chair Political Science

Defendants Ex. J

CONFIDENTIAL

THE CITY COLLEGE
OF
THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK 10031

BERNARD W. HARLESTON
PRESIDENT

March 8, 1985

Professor Leonard Jeffries
Black Studies Department
The City College

Dear Professor Jeffries:

As you know, one of the candidates for the position of Director of the International Relations Program alleged in a letter to me that he was subjected to improper treatment during some of his interviews. In part, he wrote that:

> On two occasions, one public and the other private, patently racist and anti-semitic remarks were made to me. You personally were accused of being no more than a "tool" of White Jewish power brokers subject to manipulation by Provost Harry Lustig. Lustig himself was attacked as an individual who was only seeking to "clone" himself at City. I also found that even minimal notions of academic freedom were disregarded, as individuals attempted to apply a "litmus test" to my political beliefs.

Subsequent to receiving this letter, I asked Acting Dean Martin Tamny to "follow-up on the letter and determine as best you can the actual events that took place and to which he referred." In my letter to Dean Tamny, I also stated that "it

will be necessary to speak to Professor Seligson and obtain the specifics of relevance to him. It will also be appropriate to speak to Professor Seligson and obtain the specifics of relevance to him. It will also be appropriate to speak to and obtain specifics from the individuals that were present during the periods to which he refers."

Dean Tamny reported that the subsequently spoke by telephone to Professor Seligson who stated that you made the remarks referred to in his letter.

Dean Tamny further reported that he interviewed four of the faculty members who attended the luncheon on November 26, 1984, reading to each the paragraph of Professor Seligson's letter quoted (in part) above and asking each for his/her recollections regarding the allegations. He reported that all four "indicated that Professor Leonard Jeffries had made the remarks mentioned in the above paragraph from Professor Seligson's letter at the luncheon on November 26." He also reported that he, too, had attended the luncheon and had "heard those remarks made by Professor Jeffries on that occasion."

Regarding Professor Seligson's talk and meeting with the Political Science Executive Committee and the Executive and Advisory Committees of the International Studies Program, Dean Tamny reported that he found no evidence in the recollections of those faculty present to whom he spoke of "incidents that could be viewed as violations of academic freedom."

I then met with you on February 26, to discuss the charges made by Professor Seligson in the paragraph quoted above. In the presence of three colleagues you denied that you had made any such remarks, and specifically denied that you had made any racist or anti-semitic remarks. You also denied referring to the President as a " 'tool' of White Jewish power brokers. . ."

Except for the references made by Professor Seligson in his letter, I have not received either from Dean Tamny or from any other source, a specific, first hand report quoting statements that were attributed to you and which would define or clarify the allegations of anti-semitism or racism in Professor Seligson's letter. It is evident to me, however, that whatever the precise content of your comments, they were perceived as creating a strong and enduring perception of anti-semitic and racist sentiments. Whether this was intended or not, such sentiments or behavior is intolerable and indefensible for individuals charged with officially representing the College or for individuals functioning in a role such as Department Chair, which makes them representatives of the College.

There is no place at City College for racial, ethnic or religious bigotry, or any other attitude that denies equality among individuals. Those who are appointed or elected to leadership positions in the College have an added responsibility to insure that attitudes and values that deny equality among individuals are neither directly nor indirectly supported or reinforced. This is a necessary condition for responsible administrative leadership at City College.

There can be no further instances in which you, in your leadership role, create through insensitive comments or remarks the perception that the College supports racial or ethnic bigotry. Such actions are inconsistent with responsible leadership.

Sincerely,

/s/
Bernard W. Harleston

Defendants Ex. R

THE CITY UNIVERSITY OF NEW YORK

Office of the General Counsel and Vice Chancellor
for Legal Affairs
535 East 80 Street, New York, N.Y. 10021
212/794-5382

November 6, 1991

Memorandum

TO: Chancellor W. Ann Reynolds

FROM: Robert E. Diaz

Re: Factfinding Regarding Interview between Leonard Jeffries and Eliot (sic) Morgan

Enclosed please find a memorandum from Roy Moskowitz to me detailing the interview he conducted with Eliot (sic) Morgan on November 1, 1991. As I indicated to you in a prior memorandum, I have contacted Professor Jeffries about arranging an interview with him to discuss this matter. As of this date, he has not gotten back to me as to whether or not he will agree to such an interview and, if so, a convenient time. If an interview is held, a memorandum similar to the one enclosed will be prepared for your review. A synopsis of both interviews will be prepared in the event that you wish to furnish the Trustees with a factual review of this situation.

Defendants Ex. R

THE CITY UNIVERSITY OF NEW YORK

Office of the General Counsel and Vice Chancellor
for Legal Affairs
535 East 80 Street, New York, N.Y. 10021
212/794-5382

November 6, 1991

ATTORNEY WORK PRODUCT

Memorandum

TO: Robert E. Diaz

FROM: Roy Moskowitz

RE: Interview on Friday, November 1, 1991 with Eliot (sic) Morgan, a Harvard Crimson Editor

On Friday, November 1, 1991, Brenda Carpenter and I flew to Cambridge, Mass. to interview Eliot (sic) Morgan, a staff writer for the Harvard Crimson. Mr. Morgan is a matriculated student at Harvard University (as are all staff and directors at the Crimson) who is writing an article on Prof. Leonard Jeffries for the November 7th edition of the Crimson.

When Brenda and I arrived at the Crimson offices, we were met by Mr. Morgan and two senior members of the paper, Rebecca Walkawitz and Brian Hecht, president and managing editor, respectively. Mr. Morgan opted to have these individuals present at the interview (In my telephone conversation with Mr. Morgan, I indicated that, if he wanted, he could have other people present during the interview). Before the interview started, I explained to Mr. Morgan that the purpose of my visit was to gather as much information about the allegations reported in the press pertaining to an interview he had with Dr. Jeffries on Wednesday, October 18, 1991. I further explained that the University's jurisdiction extended only to its employment relationship with Dr. Jeffries, and that any criminal or civil action was beyond the University's purview. Mr. Morgan indicated that he understood; and that he was still contemplating such action on his own. With that, the interview commenced, with a tape recorder in full view and turned on at all times.

Mr. Morgan indicated that he has been a staff reporter for over two years (reporters are called "editors" at the Crimson). He writes feature stories primarily, having done pieces in the past on other well-known individuals such as Noam Chomsky and Camille Pagila. He first got the idea to write about Dr. Jeffries in September of this year. To that end, he contacted the City College office, eventually spoke with Dr. Jeffries, and arranged to interview him at the College on Tuesday, October 17, 1991. There were no special arrangements or conditions placed upon him by Dr. Jeffries, although Mr. Morgan did make clear that it was his intention to quote Dr. Jeffries at length, rather than paraphrase. According to Mr. Morgan, it was his hope that by doing so, he would be giving Dr. Jeffries a platform to express his views without editorial impediment; and any conclusions drawn in the article would be done only at the end of the article, where it would be clear that the writer was expressing his views separately from the subject. While the use of a tape recorder was not discussed, Mr. Morgan indicated that for interviews of this nature, it was standard procedure to use a tape recorder. He offered to play the tapes of the Chomsky and Paglia interviews if I wished.

On Tuesday, October 17, 1991 Mr. Morgan arrived at the College at approximately 3:40 p.m. He was met in the hall by a uniformed college security guard, who asked him the purpose of his visit. Mr. Morgan then indicated that he was escorted to a large "outer office" that was identified as Dr. Jeffries'. He introduced himself to the secretary, Marion Mills, who told him to be seated. Mr. Morgan indicated that he waited there for approximately three hours, without speaking to Dr. Jeffries. At one point, he approached Ms. Mills and expressed his concern (and some frustration) that, as he was aware that Dr. Jeffries was speaking at Baruch College that evening, he would be have insufficient time to conduct his interview as it was getting late. Time passed and no interview was conducted that day. Mr. Morgan indicated that he attended the Baruch lecture that evening and returned to the house of a friend for the evening.

The next morning, Mr. Morgan stated that he called Dr. Jeffries' office and spoke with Ms. Mills, indicating that he had travelled from Cambridge on his own funds and hoped that he would have an opportunity to interview Dr. Jeffries that day. According to Mr. Morgan, Ms. Mills indicated that she had spoken with Dr. Jeffries and that he would be willing to be interviewed that day, after his classes. Mr. Morgan then indicated that he would like to attend one of these classes—and permission was granted.

Morgan stated that he then went to the City College office of Dr. Jeffries. When he arrived, he again was seated in the outer officer. Shortly thereafter, Dr. Jeffries appeared from his office and indicated that Morgan should accompany him to his class—which he did. After the class ended, Morgan, Jeffries and five other individuals, three males, one female and one child, went to the faculty dining room. Morgan described the dining room as a very large open area with tables and chairs and a buffet table. After everyone had selected their food, the entire group took seats at one table—Morgan was seated to Jeffries' left and the only other individual identified, Brother Larry, was seated to Jeffries' right.

As the interview began, Morgan claims that he took his audiocassette recorder and placed it in the center of the table. He explained that it was placed in the center of the table, in full view, rather than simply next to Dr. Jeffries, so that the microphone would pick up all voices in the event that someone else said something during the interview. According to Morgan, everyone at the table was aware that a tape recording was being made of this interview.

After a short while elapsed in which Morgan claims there was incidental talk while people ate their meals, Morgan asked Dr. Jeffries what he thought of the Black-Jewish coalition. According to Mr. Morgan, Dr. Jeffries responded that no such coalition existed; that black people have had to fight for themselves for everything they have gained. He cited as one example the fact that at City College approximately twenty

years ago, there were only 200 blacks on campus even though the surrounding community was predominantly black. It took a campus takeover staged by blacks, according to Dr. Jeffries, to increase the presence of blacks on the campus.

Mr. Morgan then asked about Henry Louis Gates. Morgan explained that he asked the question in an effort to develop a "Harvard angle". According to Mr. Morgan, Dr. Jeffries' initial response was, "Who?" When Morgan began to explain who Dr. Gates was, Jeffries allegedly interjected, "I know who he is. He's a punk and a faggot." Morgan than (sic) stated that he attempted to elicit another response, in an effort to gain a more substantive response from Jeffries that he might use for his story. According to Mr. Morgan, Dr. Jeffries simply repeated his initial response. When asked about Dr. Albert Poussant, Morgan claims that Dr. Jeffries responded with the same characterization he used for Dr. Gates. Then, according to Morgan, Dr. Jeffries went on to talk about Dr. Shelby Steele, using similar language, and then adding than (sic) Dr. Steele's problem is that his mother is white, his wife is white and he has white kids. Morgan stated that according to Dr. Jeffries, you can't trust black people who sleep with white women.

At that time, Morgan asserted that Dr. Jeffries pointed to one of the men sitting at the table and said, "He used to sleep with white women." It was at this time that Dr. Jeffries allegedly turned to Morgan and said, "If I see this again, I'll kill you." When asked, Mr. Morgan said that it was not entirely clear what Dr. Jeffries was referring to when he used the work "this". Mr. Morgan denied being scared by this remark, explaining that the tape recorder was on, there were many people both at the table and in the room, and that he saw no reason to believe he was in imminent fear of bodily harm.

The interview continued for approximately one hour more. According to Mr. Morgan, there were discussions and questions regarding many of Dr. Jeffries' theories and the bases (sic) upon which they are premised. Dr. Jeffries then asked

Mr. Morgan about the Crimson. According to Mr. Morgan, when he asked how many black writers there were on staff, Mr. Morgan was somewhat evasive about answering the question directly. When Morgan informed Jeffries that there was only himself and maybe one other black person on staff, Dr. Jeffries then declared the interview "over" and "I'm going to need that tape". Mr. Morgan said that Dr. Jeffries explained that he (Morgan) was not in control and that they would not let him publish this. It was at this time, according to Morgan, that an individual identified as Brother Larry, walked up beside him and, holding out his hand, demanded the tape. After he complied with this request, Brother Larry requested "the one in your pocket too", to which Morgan complied, and then searched Morgan's book bag, explaining that he (Brother Larry) was only looking for an additional recording device. Morgan explained that this incident occurred in the dining room at approximately 3:30 p.m. without any witnesses, other than those seated at the table.

At that point, Dr. Jeffries repeated that Morgan was not in control and didn't know the powers he was dealing with. According to Mr. Morgan, Dr. Jeffries then indicated to Mr. Morgan that he should accompany him to his office, where he would furnish him with information that could be the basis of an article. Mr. Morgan stated that he complied with Dr. Jeffries suggestion that he go to his office. While there, Mr. Morgan states that he called his office, looking for one of two individuals, Liam Ford or Steve Newman, editors at the Crimson. Neither of these individuals were there. Accordingly, Morgan states that he then called their dormitory room and left a telephone message on their answering machine. A copy of the recorded message was furnished to me. In the message, Morgan states that Dr. Jeffries has confiscated his tapes and that he (Morgan) is still in Jeffries' office and will be leaving shortly.

Mr. Morgan claims that he did, in fact, leave the College shortly thereafter. Upon so doing, he walked into a bookstore

located nearby the college and encountered an individual he recognized who had been in Dr. Jeffries' office the day before as he was waiting in the outer office. When that individual asked if Morgan had been able to interview Dr. Jeffries, Morgan claims that he answered "yes" but that his tapes had been confiscated. According to Mr. Morgan, the individual responded that it may have been for the best because, "I wouldn't want to dispatch anyone up there to Boston to snuff you out". Mr. Morgan then left the bookstore and returned to Harvard.

My interview concluded with Mr. Morgan shortly thereafter. He indicated his willingness to cooperate further, if it should become necessary; that the statement he had just given was truthful and accurate to the best of his abilities; and if anything further occurred to him, that he would call me. The interview ended at approximately 3:15 p.m.

morgan

Plaintiff's Ex. 5

THE CITY COLLEGE
OF

THE CITY UNIVERSITY OF NEW YORK
CONVENT AVE. at 138 ST.
NEW YORK, NEW YORK 10031

OFFICE OF THE PRESIDENT

August 8, 1991

Dear Colleague:

Earlier in my presidency, I released a statement to the City College community in which I stated that "there is no place at City College for racism, anti-semitism, ethnic snobbism or any other attitude that denies equality among individuals."

Once again, I reaffirm this position in the light of the controversy surrounding Dr. Leonard Jeffries' most recent remarks. Professor Leonard Jeffries' speech at the Empire State Black Arts and Cultural Festival in Albany, unfortunately, contained clear statements of bigotry and anti-semitism. While these remarks were made at an event unrelated to the College, they nonetheless undermine our determination to maintain an environment characterized by civility and mutual respect, and free of racial, religious and ethnic conflict.

As the President of this College, it is my responsibility to assure the College community that attitudes and values that denigrate individuals and groups have no place at City College. Certainly, we must insure the right of our faculty and students to express their ideas, both in and outside of the classroom, without fear of institutional censorship. However, the right to free expression and, indeed, to academic freedom is not and cannot be absolute. With freedom must come accountability.

I, therefore, would like to reassure you that at the beginning of the Fall semester, I will initiate a thorough review of this situation. This review will be conducted in consultation with faculty and staff, and will follow a procedure that respects the principles of academic freedom and assures due process.

Sincerely,

/s/
Bernard W. Harleston

Plaintiff's Ex. 13

FACULTY SENATE OF THE CITY COLLEGE
MEETING OF SEPTEMBER 19, 1991

Recorded Present: President B. Harleston, Provost R. Pfeffer, Vice President D. Cabezas, Vice President G. McDonald, Vice President J. Yellin, Chief Librarian W. Luguire, Ombudsman B. Sohmer, Registrar T. Jennings, Deans M. de la Nuez, A. Fiellin, M. Marin, B. Morgan, V. Red, C. Watkins; Senators S. Banerjee, J. Barshay, P. Baumel, P. Bobb, V. Box, D. Bushler, C. Cappetti, G. Carro-Kowalcyk, V. Chung, R. Coico, W. Crain, R. Davis, J. de Jongh, S. Derman, V. Diyamandogulu, M. Dorn, C. Evans, R. Grossman, J. Harbeson, D. Horwitz, J. Jiggetts, S. Kelly, N. Kesselschmidt, G. Kranc, S. Lucci, S. Lyon, D. Lytra, K. Malkoff, L. Mantel, N. McKelvie, D. Mintz, B. Newling, B. Popper, E. Rajec, E. Reitz, C. Riedler-Berger, D. Sank, D. Seales, M. Silver, H. Silverstein, A. Sloan, B. Sohmer, E. Starcevic, M. Wallace, S. Wecker, C. Weldon, J. Wilner, I. Yellowitz; F. Vincent, R. Pons.

Excused B. Jenkins, G. Murphy.

Absent: J. Braveboy-Wagner, W. Cotton, J. Johnson, M. Lev, G. Thompson.

Guests D. Morgan, L. Jeffries, W. Cartey, I. Henderson, C. DeCicco, R. Villa, M. Silberberg, P. Zadra, F. Kogut, N. Campbell, A. Bachman, A. Martinez, K. Bartholomew, E. Rios

Call to Order
The meeting was called to order at 2:14 p.m.

Memorial Resolution
A memorial resolution for Professor Emeritus John Neulinger of the department of Psychology was read by Professor William Crain. (Attached)

The agenda was revised to allow the report from the Nominations Committee to precede the Executive Committee Report.

A motion was made and seconded to permit print media to attend the meeting today.

A motion was made and seconded to permit electronic press, namely Channel 11, to attend the meeting today. Motion:

For 26
Against 14

The motion carried.

The vote on the motion was as follows:

For 10
Against 22

The motion failed.

A motion was made to accept section 3. The vote was as follows:

For 23
Against 8

The motion carried.

The approved resolution reads as follows:

Whereas, the Faculty Senate on October 20, 1988 adopted a resolution stating in part that "The Faculty Senate recognizes and prizes the rights of a faculty member to express his or her views without restraint"; and

Whereas, in a resolution offered by the Academic Freedom and Faculty Interests Committee and adopted on October 18, 1990 that principle was reiterated, "(notwithstanding that such views may) . . . offend our fundamental notions of human decency and . . . (may be) . . . contrary to the basic ideas upon which City College was founded";

Now, therefore, be it resolved that The City College Faculty, through its authentic voice, the Faculty Senate:

> deplores the breach of academic courtesy and decorum in the ethnic slurs used by Professor Leonard Jeffries, Jr. to refer, first, to a colleague and a member of this body, and second, to a larger group of colleagues, in a speech delivered on July 20, 1991 at Empire State Black Arts and Cultural Festival; and
>
> disavows and rejects the abhorrent anti-Semitic and anti-Italian sentiments he has expressed; but
>
> repudiates as incompatible with academic freedom, any attempt, whether originating from inside or outside The College, to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views; and
>
> Calls on those who may disagree with the substance of Professor Leonard Jeffries, Jr.'s views to challenge their accuracy and cogency in the free exchange of ideas.

Adjournment
The meeting was adjourned at 5:35 p.m./

Respectfully submitted,

Dottye Seales, Secretary

Plaintiff's Ex. 22

TO: President Bernard W. Harleston

FROM: Provost Robert Pfeffer and Dean Jeffrey Rosen

DATE: November 18, 1991

On Tuesday, November 12, 1991, we met with Professor Jeffries to discuss his activities and the future of the Department of Black Studies. The Dean and Provost told Professor Jeffries that it was now in the best interest of the Department if he were to step down as Chair. He was told that if it were not for the matter of "face", it was, in fact, in his own best interest to step down as well. In brief, we said that given his many external and community based commitments he could not devote full time to the myriad of problems that the Department now confronted. The state of the Department was such that it could not be allowed to suffer a de facto part time chair. We as Provost and Dean had to be the advocates for the primacy of the Department, its' integrity, and its' future development. Thus it seemed to us that the only way in which Professor Jeffries could fulfill his commitment to the extra collegiate community and his national agenda, while also assuring the future of the Department was to, in fact, step down as chair and collaborate with us in the recruitment of a new chair; one devoted to the Department and skilled as an academic administrator.

Professor Jeffries' response was unfortunately all to predictable. At first he categorically rejected our proposal, claiming that any efforts to dislodge him as chair would be met with massive community resistence (sic) that "would make Crown Heights pale in comparison", He went on to claim that CUNY would never recover from the tragedies that would follow. He subsequently modified his stance with us and said that he alone could not decide on a question of his chairmanship and that he would have to talk with his advisors. (Past experience suggests that the latter stance is simply

Professor Jeffries rather more civil way of saying that there is no point in our continuing to talk about something he has no intention of doing).

See attached memo for additional comments made by Professor Jeffries during this meeting.

THE CITY COLLEGE
OF
THE CITY UNIVERSITY OF NEW YORK

NEW YORK, N. Y. 10031

OFFICE OF THE
DEAN OF SOCIAL SCIENCE (212) 690-815_

CONFIDENTIAL MEMO November 13, 1991

On Tuesday, November 12, 1991 the undersigned met with Professor Jeffries for approximately one hour beginning at 4:30 p.m. During that meeting Professor Jeffries made the following statements:

- The Jews are out to get me.
- The Jewish press has mounted a systematic campaign to destroy me.
- They (the Jewish Press) have labeled me a conspiracy theroist (sic).
  Do you know what being labeled a conspiracy theroists (sic) by the Jews means? It means that they have marked me for destruction.
- [Illegible handwritten notation]
- Jews of Phila. Assante

Provost Robert Pfeffer

/s/
Dean Jeffrey Rosen,
Division of Social Sciences

Excerpts from Plaintiff's Ex. 26

1/77 Sec. 9.1

ARTICLE IX—ORGANIZATION AND DUTIES OF FACULTY DEPARTMENTS

Section 9.1 DEPARTMENT ORGANIZATION. a. Each department, subject to the approval of the faculty or faculty council, where existent, and subject to the provisions of other sections of these bylaws, shall have control of the educational policies of the department through the vote of all of its members who have faculty rank or faculty status; and if the department so desires, it may enfranchise persons in visiting professorial titles and other members who have been appointed on an annual salary basis for a first or second year of full-time service to vote on departmental matters except for the election of department chairpersons, departmental committee on personnel and budget or departmental committee on appointments. Each department shall cooperate with related departments and with college agencies in general in the development of college-wide interests.

b. The executive officer of the department shall be the department chairperson who shall be a professor, associate professor or assistant professor elected by secret ballot for a term of three years, except as provided below, by a majority vote of all the members of the instructional staff of the department who have faculty rank. Proxy or mail voting shall not be permitted. The department chairperson must be tenured or have been approved by the board for tenure at the time of his/her election, except in departments less than seven years old. Such elections shall be subject to the subsequent approval of the president and the board. The present system of staggered departmental elections shall be continued. The successors of department chairperson shall be elected during the first full week in May at the expiration of the respective terms

of office to take office as of July first of the year in which they are elected and at three year intervals thereafter. Vacancies shall be filled by election for the unexpired term. Notwithstanding anything in the foregoing to the contrary, in the library department, the president of the college shall from time to time recommend a member of the department to the board for designation as chairperson. Department chairpersons who are not tenured professors, associate professors or assistant professors on January 1, 1976 may fill out their unexpired terms as chairpersons, subject to the provisions of sections 9.1(c) and 9.6(a) of these bylaws.

c. In any case where the president does not approve the election of a department chairperson, or at such other time as the interests of the college may require the removal of a chairperson and the appointment of a new one, he/she shall confer with the department and thereafter shall report to the board any subsequent action by the department with respect thereto, together with his/her own recommendation for a chairperson. The recommendation by the president to the board for the designation of the department chairperson should take place only after careful consideration by the president of the qualifications of those selected by the respective departments. The president shall base his/her recommendation on the capacity of the individual selected to act effectively as the departmental administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy.

d. Where there are less than three tenured professors, associate professors and assistant professors in a department, the president may, except where the department has been in existence for less than seven years, after consultation with the departmental faculty, recommend the appointment of a chairperson to the board from among the members of the department holding professorial rank. Where the department chairperson is recommended by the president pursuant to this

subdivision, subdivision c of this section, or subdivision a of section 9.6 the chairperson need not be tenured.

e. The faculty, unless there be a faculty council, in which case the faculty council (except in the city college, in which case it shall be the faculty senate), shall have the option of determining whether the college shall operate under plan no. one or plan no. two, as outlined below and in section 9.8.

PLAN NO. ONE—There shall be in each department a committee on appointments consisting of the department chairperson and, where possible, of four other members who must have faculty rank. The number of members of faculty rank shall not affect provision for student membership if a college governance plan so provides. Four of the faculty members of the committee must be tenured, except if the department has fewer than four tenured faculty members. The department chairperson shall be the chairperson of the committee. The four faculty members shall be elected by a majority vote of those persons in the department having faculty rank. Election shall be held at the same time that the department chairperson is elected. A vacancy in the office of the chairperson prior to the expiration of his/her term when such vacancy necessitates an election for a new chairperson shall not affect the term of the committee.

PLAN NO. TWO—There shall be in each department a departmental committee on personnel and budget, consisting of the department chairperson and where possible, of four other members who must have faculty rank. The number of members of faculty rank shall not affect provision for student membership, if college governance plans so provide. Four of the faculty members of the committee must be tenured, except if the department has fewer than four tenured faculty members. The department chairperson shall be the chairperson of the committee. The four faculty members shall be elected by a majority vote of those persons in the department having faculty rank. Election shall be held at the same time that the department chairperson is elected. A vacancy in the office of

the chairperson prior to the expiration of his/her term when such vacancy necessitates an election for a new chairperson shall not affect the term of the committee.

In departments with fewer than four tenured faculty members, the president after consultation with the departmental faculty, shall appoint an ad hoc committee to make recommendations on appointments with tenure in lieu of a committee on appointments or a departmental committee on personnel and budget.

f. There shall be a committee on personnel and budget for the hunter college elementary school and a committee on personnel and budget for the hunter college high school. The committee in each school shall consist of the principal, as chairperson, the chairperson of the department of education of hunter college, and three members of the instructional staff of the school, elected for a term of three years by members of the permanent instructional staff of the school. These committees shall have in each school, insofar as practicable, the same functions as are assigned by these bylaws to a departmental committee on personnel and budget in a college.

g. Each department may name such other committees as it chooses and shall have the fullest measure of autonomy consistent with the maintenance of general educational policy.

Section 9.2 PROCEDURES FOR DEPARTMENT COMMITTEES. Each department committee shall keep minutes of its proceedings conforming insofar as is practicable to Robert's Rules of Order, Revised. It is the responsibility of the department chairperson, except as specified below, to circulate the minutes of each departmental committee to all members of the department.

The actions of the appropriate committee concerned with instructional staff appointments, reappointments with tenure and promotion shall be by secret ballot, and the result of the balloting shall be duly recorded in its minutes. All records of the proceedings with respect to a candidate shall be filed in

the candidate's administration file, available only to the committees and individuals responsible for the review and recommendation of appointments, promotion, and tenure. It shall be the duty and responsibility of the department chairperson to communicate to the candidate the action of the committee, but no reason shall be assigned for a negative recommendation. The affirmative recommendations of the committee shall be submitted by the department chairperson to the president and appropriate college committee on personnel and budget in accordance with the procedures set forth in the bylaws of the board.

Section 9.3 DUTIES OF DEPARTMENT CHAIRPERSON. a. The department chairperson shall be the executive officer of his/her department and shall carry out the department's policies, as well as those of the faculty and the board which are related to it. He/she shall:

1. Be responsible for departmental records.

2. Assign courses to and arrange programs of instructional staff members of the department.

3. Initiate policy and action concerning the recruitment of faculty and other departmental affairs subject to the powers delegated by these bylaws to the staff of the department in regard to educational policy, and to the appropriate departmental committees in the matter of promotions and appointments.

4. Represent the department before the faculty council or faculty senate, the faculty and the board.

5. Preside at meetings of the department.

6. Be responsible for the work of the department's committee on appointments or the department's committee on personnel and budget which he/she chairs.

7. Prepare the tentative departmental budget, subject to the approval by the department's committee on appointments or the department's committee on personnel and budget.

8. Transmit the tentative departmental budget to the president with his/her own recommendations.

9. Arrange for careful observation and guidance of the department's instructional staff members.

10. Make a full report to the president and to the college committee on faculty personnel and budget of the action taken by the department committee on personnel and budget or department committee on appointments when recommending an appointee for tenure on the following.

a. Teaching qualifications and classroom work
b. Relationship of the appointee with his/her students and colleagues.
c. Appointee's professional and creative work.

11. Hold an annual evaluation conference with every member of the department after observation and prepare a memorandum thereof.

12. Generally supervise and administer the department.

b. Each library where size makes it practicable, shall constitute an instructional department of the college. The chairperson thereof shall be designated by the president. Such chairperson, in addition to the duties of department chairperson as enumerated in paragraph "a" of this section, shall be charged with the administration of the library facilities of his/her college and shall perform such other duties as the president may assign. Such chairperson is hereby authorized to use the additional title of "chief librarian."

c. Where student personnel services are constituted an instructional department of the college, the dean of students shall be the department chairperson.

Section 9.4 PROGRAM STRUCTURE IN THE UNIVERSITY GRADUATE DIVISION. a. The faculty of each ongoing doctoral program shall be determined at the start of each academic year and shall consist of all full-time faculty members currently performing any of the following functions and of those who performed any of these functions at some time during the two academic years preceding the annual determination of the membership in September of each year: (1) teaching a course in the doctoral program; (2) serving on a dissertation committee or supervising a dissertation; (3) participating in a second doctoral examination.

With the approval of the president, the following faculty members, upon nomination by the program's faculty membership and research committee, may be added to the faculty of a doctoral program: (1) currently serving adjunct professors and adjunct associate professors; (2) professors, associate professors and assistant professors currently pursuing significant research relevant to the doctoral program; (3) in special circumstances, professors whose participation, or whose advice in some aspects of the program is particularly relevant.

These appointments will be reviewed annually by the president, beginning at the end of the academic year following the academic year in which they were made.

During the first two years of a program, the faculty shall be appointed by the president. Thereafter, the program's faculty shall be constituted as in the foregoing paragraph.

Plaintiff's Ex. 45

For immediate release

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The City
University
of New York

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Statement By
Board of Trustees' Chairperson James P. Murphy,
Vice Chairperson Edith B. Everett, and
Chancellor W. Ann Reynolds of
The City University of New York
August 8, 1991

We are shocked and deeply disturbed by the irresponsible and inflammatory statements made by City College Professor Leonard Jeffries, Jr. at a recent forum in Albany. The University intends to examine Professor Jeffries' actions and statements and, if warranted, to pursue vigorously with City College the remedies that may be appropriate and available under the Board's Bylaws and elsewhere that relate to the professional conduct of faculty and staff.

At a time when this city and state need people of every racial and ethnic background working together to foster unity, Professor Jeffries' remarks serve only to fuel the fires of bigotry and disharmony.

-more-

During the last academic year, a City College faculty committee was convened by President Bernard Harleston to review racially derogatory statements made by Professor Jeffries and Professor Michael Levin, another member of the City College faculty. The committee noted, in part, that "there are utterances by faculty, even outside of class, that can have a detrimental impact on the educational process." In view of these recent comments by Professor Jeffries, City College will consider whether further action is required.

The mission of The City University of New York is to provide access to an excellent education to all of the people of New York. A university seeks to find and to impart truth through scholarship, a process that requires an exchange of ideas based upon research, reflection, and analysis; its mission is protected by the principles of free speech, academic freedom, and due process. Professor Jeffries' remarks threaten that mission and seriously challenge the delicate balance between academic freedom and responsibility.

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# # # # #

TRANSCRIPT OF TESTIMONY DURING TRIAL OF BERNARD W. HARLESTON

April 29, 1993

Q. (COLUCCI) What was your reaction to the speech?

A. Well, principally and immediately I was concerned about the what I thought were the glaring personal references to individuals that I felt were—were designed to be denigrating, including a reference to a member of the City College community, Prof. Bernard Sohmer. So I was, from my personal response, appalled by those references

* * *

Q. Let's move forward then to 1991. And were we left off before we got into this detour was your reactions to the speech and your considerations of the options from Provost Pfeffer.

What did you do when you came back to the campus in connection with the speech?

A. Well, I thought that, that the most, the most significant concern of mine would be the question of whether as a consequence of the enormous negative reactions to the speech, whether we could be assured that Prof. Jeffries could continue to carry out the responsibilities of chairperson.

Q. What made you think there might be a problem in that area?

A. Well, the reactions, as I say, were enormous in range. Clearly many of them were directed to him, the question of whether he would be distracted by the activities involved in responding—

HARLESTON TESTIMONY CONT'D

MR. FLEMING: Objection, your Honor. The witness doesn't know what was directed to Dr. Jeffries unless he can state some source of personal knowledge.

THE COURT: Objection sustained.

Q. What do you mean by that? Do you mean that you were aware of communications directly to Prof. Jeffries?

A. Yes, I was.

Q. How were you aware of them?

A. People—in some instances I got a copy of some letter. In other instances—

* * *

Q. Would you please continue with why you thought there might be a problem resulting from the speech that might affect Dr. Jeffries's responsibilities to carry out his duties as chair?

A. We were concerned about the duties, namely of maintaining, maintaining the office records, making assignments of courses and teaching loads. We were concerned about his responsibility in the sense of chairperson being able to effectively interact with other departments and join in carrying out the mandate and the philosophy of the City College, which is a part of the definition of his being, of being chairperson.

Q. At this point, did you have any, anything more than the most tentative views as to whether there was in fact a problem?

A. No.

Q. And what did you do in response to your concerns that there might be a problem?

A. I asked the provost if he would initiate a review including consultation with Dean Rosen, Prof. Jeffries, I believe others, in terms of his judgment, to determine whether—what the

impact of the speech, in terms of reactions to it, were on Prof. Jeffries's ability to continue to be effective as chairperson.

Q. When you say the impact of the speech, how is that different from the speech itself?

A. Well, the impact—the speech are words and ideas and statements. The impact are the kinds of things that follow from the speech, and the way they interact with the college's operation from department through all other aspects of the college.

Q. Was anything about this speech itself, apart from the impact as you have described it, the subject of Provost Pfeffer's review?

A. No.

* * *

Q. Did you have in this November 1991 period any personal interaction with Prof. Jeffries?

A. Yes.

Q. Would you describe it, please.

A. I—my office received a call one day asking if Prof. Jeffries could come over at that moment to meet with me. The secretary indicated that I was on my way out to a meeting, and he said to her, as she reported to me, "Well, that's all right. I'll meet him as he's leaving."

I took the elevator down to the first floor of the administration building where I found Prof. Jeffries and a number of other individuals, some of whom were with him, others of whom were doing their—doing business or using the hall in terms of going to one office or another. There was a number of security there and the man who drove the college's car.

Prof. Jeffries said, "I want a copy of every speech you've ever given." And I said, "Well, why?" And he said, "Because I want to see if you have called anybody else a racist." And I

said, "Well, it's unlikely that you can get every speech I have, but I'm sure you will probably find that I have not called anybody racist. I don't normally use that language."

"Well, he says, "you called me a racist." I said, "I did not." He said, "You did. The New York Times said you did." And I said, "Well"—the New York Times article that he indicated—was referring to makes it very clear I did not call him racist.

He said, "As for the matter of evaluating me, you are not fit to evaluate me." And I said, "Prof. Jeffries, I really need to go, and I do not wish to carry this on." And he said, "Well, you ought to stay and continue" and went like that toward me. I said, "Sorry, I have to leave." I went toward my car and left.

THE COURT: The witness made a reference to certain gestures he was making, a thrusting motion with his hand, which I take it you were attributing to Prof. Jeffries.

THE WITNESS: Yes, sir.

THE COURT: This was made in your direction?

THE WITNESS: Yes.

THE COURT: All right, let's proceed.

Q. Did he make any physical contacts with you in the thrusting motion that you just—

A. No.

Q. And what was the tone and manner of Prof. Jeffries' remarks to you?

A. Well, certainly angry, certainly hostile, certainly confrontational.

Q. Loud?

A. Oh, and certainly loud.

HARLESTON TESTIMONY CONT'D

Q. All right, now, shortly after that incident did you come to a decision about whether Prof. Jeffries ought to be continued as department chair at the expiration of the one-year term?

A. Yes.

Q. About when did you reach a decision?

A. I think I would say early—early—early December.

Q. All right. And what decision did you come to?

A. I concluded that it would be—simply be in the best interest of the Department of Black Studies and the college if we brought in new leadership to be chair of the department.

Q. Why did you think that?

A. Well, I was persuaded that the department was certainly not getting any better; that there were—there was sufficient evidence in Prof. Jeffries' conduct that persuaded me that he could not provide inspired leadership. It was clear to me that the department needed to go in some different directions. And it was clear to me that no one in the department really would—would qualify to assume the leadership role.

* * *

HARLESTON-Cross

Q. (FLEMING) All right. And so when you did have an opportunity to look at the speech or to read the speech or to hear the speech, what was your reaction then?

A. As I indicated earlier, my reaction was one of alarm and concern.

Q. The word alarm?

A. Alarm and concern about the personalized attacks that were made on colleagues, including a member of the City College community. And I was concerned about—in terms of the discussion of the slave trade issue, I was concerned about

HARLESTON TESTIMONY CONT'D

what I thought was an imbalanced emphasis on the role of Jews.

* * *

HARLESTON-Redirect

Q. (COLUCCI) And what conclusions had you drawn?

A. With respect to alumni fund raising, we had evidence that pledges had been either voided or people had failed to make a payment of sort having promised to do so. We had one of the principles, one of the fundamental tenets that had been developed by the university was the university's position on pluralism and diversity and the prescription in it for the articulated expression of respect for all individuals and all ethnic groups. That had been compromised. With respect to government, we had had and continued to received a number of statements of concern by members of the state government.

I don't know any others that come to mind at this moment.

Q. At that time, had you made up your mind whether all of this would have any effect on Prof. Jeffries's ability to lead the Black Studies Department?

A. At the time?

Q. At that time.

A. I wasn't sure. I wanted to continue to try to determine that.

* * *

TRANSCRIPT OF TESTIMONY DURING TRIAL OF ELLIOT MORGAN

April 30, 1993

Q. (COLUCCI) All right. What else did you discuss in the course of this interview?

A. Oh, afterwards I asked him what he thought of Prof. Henry Luis Gates.

Q. Who is Prof. Henry Luis Gates?

A. Prof. Henry Luis Gates is the chair of the African American Studies Department at Harvard University.

Q. And what did he say when you asked him about Prof. Gates?

A. Initially he said, "Who?" And I thought that he was—that he didn't know who he was, so I was confused. So I began to explain, and then he interrupted me and said, "Skip Gates, Skip, he's a faggot and a punk."

Q. Well, after he called Skip Gates a faggot and a punk, what did you do?

A. I learned forward to check my tape recorder. It was becoming a more exciting interview.

Q. Was it working?

A. It was working. I learned forward. I checked it. And I asked him the question again, and he gave me the same answer again, so I decided to move on because that was his definitive statement. I—at least that's what he gave me on—on Dr. Gates after being asked twice.

Q. And when you say you moved on, what topics did you move on to?

MORGAN TESTIMONY CONT'D

A. Afterwards we—he—we were discussing the Thurgood Marshall and Clarence Thomas contrast. He actually—he mentioned that there was a very different thing between Clarence Thomas and Thurgood Marshall because Thurgood Marshall didn't marry a white woman, he married a Filipino woman, which Dr. Jeffries said in the interview Filipinos are actually black, look at their lips, look at their noses.

Q. And how does that make him any different from Clarence Thomas?

A. Just from what he said was that—that Filipinos are actually black, so Thurgood Marshall married a black person and—technically, I guess—and Clarence Thomas did not.

Q. And did he mention what kind of woman Clarence Thomas did marry?

A. Oh, yeah. He said Clarence Thomas married a white woman.

Q. And did he discuss anybody else besides Skip Gates and Clarence Thomas and Thurgood Marshall?

A. Thurgood Marshall, Skip Gates, Clarence—he—he went on a while about homosexuals. He—after one of his statements I asked him if he felt that it was an—that as an Afrocentrist, that it was right to exclude certain people, certain blacks, based on their sexual preference. And he said that homosexuality was actually not something that was native to—to blacks, not natural for blacks. He says that it was an ice element thing. He hinted it was—that when he was in Europe, that European men used to offer their wives to him in exchange for gay sex.

Q. Let's make it clear. He's not saying that he participated in these transactions?

A. No, no. He was saying that this was just an—he made a statement of an offer. He made no statement about taking in anything, no.

MORGAN TESTIMONY CONT'D

Q. Just wanted to make sure we were very clear about that.

A. Okay.

Q. All right. And after he discussed his these unusual offers of homosexual sex in Europe, what happened next?

A. Well, after the statement about Dr. Gates—and really from Dr. Gates he went to Shelby Steele. If I'm being chronological here, and I guess I should be, so after Dr. Gates he mentioned Shelby Steele, and he said that Shelby Steele was the same way. He says it was like a fellow in California, Shelby Steele, who married a white woman. He's—he has to talk inclusion because he has to go home and face his white wife.

And I—again I'm just checking my tape recorder because this is all—I mean, as a reporter, this is good stuff to have on tape. He said that, "Well, if I see this again, I'll kill you." And it's a line in the sand —it was a line in the sand. It was nothing I could have actually crossed at that time. So, although it was disturbing to hear, I wasn't shaking at that particular moment because there was nothing I could do to get that statement in print from where I was sitting.

Q. So did you continue to with the interview after you were told "If I see this again, I will kill you"?

A. Yes, I did.

Q. And how did the interview continue?

A. It actually continued as a series of talks from again very current events. And it was incredibly, I mean, very current events, talking about, again, Thurgood Marshall and the big transition that was going on at the time, just newspaper headline things of the day. And he said some things about homosexuals and then said, "I'm going to have to take that tape."

Q. And after he said "I'm going to have to take that tape," what happened?

A. At that point I didn't move toward the tape. I didn't cut it off. There was a gentleman at the table who said, "Cut the tape off." And Dr. Jeffries motioned to him. "No," he says, "he can leave it on." And he talked a little bit more, the specifics of which I don't know. Again, it was generally on the same topic.

This talk went on, this back and forth between Dr. Jeffries and I, for maybe 50 minutes. And I had to actually switch a tape while we were talking. And when I switched the tape—and I had one in my jacket—he—after the statement that was made about what would happen if he saw this again and he would have to take the tape, the fellow that had followed me to the classroom and followed Dr. Jeffries to the classroom actually said, "Well, I'm going to have to take the tape."

Q. Is this the person you've previously identified as Brother Larry?

A. Yes, it is.

* * *

Q. All right. Now, when Brother Larry asked for the tape, what did you do?

A. I sat back away from the tape on the table, and he got up and he came toward me, and he said "The one in your pocket." And I reached in my pocket and handed him the tape. And he took the tape out of the one on the table and put it in the machine to see. And Dr. Jeffries looked at him, and he says, "I just want to make sure it's the same tape." So he checked it, he played it a little bit. It played, and he took the tape, he took both of them. They were two microcassette tapes.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution Amendment [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial.

Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, sub-

sequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) Same. Denial of Motion for Judgment as a Matter of law

If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within

which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 94-112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GIUDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Petitioners,

– against –

DR. LEONARD JEFFRIES, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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No. 94-112

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OCTOBER TERM, 1994

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Petitioners,

– against –

DR. LEONARD JEFFRIES, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

In their Petition for Certiorari, Petitioners presented a neatly crafted fact pattern that was contrary to the facts actually established in this case and accepted by the jury

that heard and considered all of the evidence presented at trial. As a consequence, the Petitioners have not properly or honestly framed the issues they now present to this Court. Petitioners have attempted to create a scenario designed to align this case with those cases in which this Court has upheld speech related termination of a public employee and thereby create an illusion of inconsistency in the Court of Appeals' decision for which they seek review. Petitioners' analysis of this case improperly concludes that the decision of the Court of Appeals adversely impacts on the consistency of Circuit Court interpretations of First Amendment protection of public employees. The Petitioners' analysis and conclusions are incorrect and represent an attempt to elevate to a level necessary to qualify this case for review, a matter that is of personal political concern to the individual Petitioners, but which does not present any questions that have not already been answered in the same way by this Court or by other Circuits.

As discussed herein, Certiorari should be denied in this case because:

1. The Second Circuit Court of Appeals' decision is not in conflict with any decision of this Court or of any other Court of Appeals; and,

2. This case does not present special or important reasons for the granting of Certiorari.

STATEMENT OF THE CASE

Respondent respectfully refers the Court to the factual statement presented by the Second Circuit in its opinion (Petition at 4a to 13a).

Petitioners' statement of the case is an attempt to force upon this Court a set of facts and circumstances not proven at trial, not accepted by the District Court in its consideration of the Petitioners' Post-Trial motions, and rejected by the Court of Appeals in reaching its decision.

Petitioners' statement of the case attempts to frame the issues as involving a challenge to the "authority of university administrator's to decide who may speak for the university." This was not a question below and it is not a proper or appropriate question for the Petitioners to present for consideration now. Petitioners further muddy the waters of review by incorrectly defining for this Court the Respondent's position, authority, and role as a Department Chair and by mis-stating the true purpose and nature of a public university.

This is a Petition for a Writ of Certiorari, intended to seek review of a Decision of the Second Circuit Court of Appeals. This matter is now before this Court on a Petition for review after having endured a process beginning with a trial in the district court. In any such process, a common thread of fact and reality must run throughout. That thread is broken when Petitioners seek now to recast the facts and introduce fictionalized reality in support of their petition.

Notwithstanding any statements by Petitioners to the contrary, the relevant and essential facts in this case are:

1. That the speech in question (the "Speech") was not, was never intended to be, and was never considered as spoken in the course of or related to the Respondent's employment with the Petitioners. (Although Respondent is actually an employee of City College of New York ("CCNY"), CCNY is not named as a party in this case, the word "Petitioners" will hereafter be used to describe

the named parties and/or the entity that actually employs the Respondent).

2. That the Speech was not given pursuant to or in relation to any function of the City University of New York ("CUNY") or CCNY.

3. That the Respondent spoke as a private citizen at an event entirely unrelated to the Petitioners or his employment with the Petitioners.

4. That at the time of his Speech, the Respondent functioned as the Chairman of the Black Studies Department at CCNY. As Chairman, the Respondent functioned in a University system with 199,554 students, 9,100 faculty members, 596 managerial administrators, and 595 chairpersons of the various departments within the twenty-one (21) colleges comprising the City University system.[1],[2]

As Chairman, the nature and extent of Respondent's leadership role was limited to the leadership of his department and advocacy of his department's interests. The applicable provisions of the CUNY By-Laws governing the role and function of a Department Chair, provide that the Chair of a department merely participate "in

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[1]Source: Peterson's College Guide.

[2]It should be noted, that had it not been for the fact that Respondent was a pioneer in the field of Black Studies, (he formed one of the nations first Black Studies Departments at San Jose State University and built the Department at CCNY); Respondent's involvement as Chairman of the Association for the Study of Classical African Civilizations; his leadership in the field of African centered and multicultural education; and, his role as a consultant to the State of New York on curriculum reform, he would labor as Chairman in relative but noble obscurity, just as the great majority of CUNY's other 594 Department heads do.

the formation, development and interpretation of college-wide interest and policy" (Article IX, Section 9.1(c), Petition at 139a). This provision does not bestow upon a Department Chair any college-wide power or authority, but simply requires that a Chair be able to bring the interests of his department to the table when college-wide interest and policy is discussed. In line with this requirement, a Department Chair is expected to manage his or her department, not the College or the University. The language of the CUNY By-Laws clearly and simply describes Respondent's role as that of leader, spokesman and advocate for his department, not as leader, spokesman or advocate for the University or the College. (Article IX, Section 9.3, Petition at 142a to 143a). Moreover, and with respect to the managerial and organizational structure at CUNY and CCNY, Department Chairs are excluded from positions of University-wide or College-wide authority. This interpretation was confirmed by the Petitioners' Vice Chancellor for Legal Affairs, Robert Diaz, when he stated before a New York State Senate Committee that, Department Chairs "perform a managerial function, but they are not managerial". (SA5)[3]

Petitioners argue that the Speech threatened the effective and efficient fulfillment of their responsibilities to the public. Yet, in their effort to qualify for review, the Petitioners fail to identify the public services they perform through their employees, that were hampered by the Speech and how the Speech hampered their ability to deliver those services. The Petitioners offer only references to "missions", one described as an effort to

[3] "SA" denotes the Supplemental Appendix submitted to the Court of Appeals.

enhance diversity and pluralism (Petition at page 8) and another described as providing access to an "excellent education to all of the people of New York". (Petition at page 8). These missions are fine, laudable and necessary goals for a public institution, but they fail to speak to the operations, functions or responsibilities of the Petitioners and, therefore, fail to identify how the effective and efficient operation of the University, the College or the Black Studies Department was hampered or threatened by the Speech. Petitioners mislead this Court when they define their purpose and function in vague and idealistic terms rather than to present concrete definitions of their operations. Nevertheless, we can understand the Petitioners' true function by examining the definition of "*education*" as found in The Random House Dictionary of the English Language, College Edition. The Random House Dictionary defines *education* as *"the act or process of imparting or acquiring general knowledge and of developing the powers of reasoning and judgment"*. The general function of any academic institution is, therefore, to promote, not to limit, the free exchange of ideas. An institution of higher learning is in fact supposed to be our nation's busiest and most diverse market place for the exchange of ideas, all ideas, including those ideas not popular with or palatable to vocal or powerful segments of our society. The Petitioners' responsibilities in furtherance of this function include management of personnel, student enrollment, public money and property. Although they attempt here, as they did during the trial in the District Court, to link the Speech to some threatened or actual harm to this aspect of their public function and purpose, they are unable to identify one scintilla of credible evidence to support their allegations of harm. The Petitioners claim

an impact on financial contributions to the University but when given the opportunity to do so they failed to present any evidence of lost income as a result of the Speech. The Petitioners claim an impact on the Respondent's colleagues and their willingness or ability to work with the Respondent or within the University as a result of the Speech. No evidence was presented at the trial, which took place almost two years after the Speech, of any refusal or failure of any faculty member or administrator to work with the Respondent or within the University, as a result of the Speech. Petitioners argue that the Speech would harm student enrollment. In fact, enrollment has increased both in the Black Studies Department and in the College in the years following the Speech. University-wide, student enrollment has gone from 199,554 during the 1991-1992 academic year (the year the Speech became a public issue) to 202,531 during the 1992-1993 academic year. Student enrollment for the 1993-1994 academic year, the year following the Respondent's highly publicized and successful litigation against the Petitioners in the District Court, and his subsequent reinstatement as Chair of his Department, jumped to 208,000.[4] The increases in 92-93 and in 93-94 were greater than the increases in the year preceding the Speech, with the increase in the 93-94 academic year being the second largest yearly increase in a decade. The Petitioners suffered no real harm as a result of the Respondent's Speech. What did happen was that there was an increase in the level and intensity of research and debate following the Speech. This, one would think, would be welcomed in an academic institution.

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[4]Source: City University Of New York, as reported by the New York Times, January 9, 1994.

Petitioners lace their Petition with references to allegations regarding the Respondent's actions or performance as Chair before and after the Speech. As both the District Court and the Court of Appeals observed, not a "scintilla of evidence" was presented to show that any of these alleged events impacted or influenced the Petitioner's decision to deny the Respondent his duly elected three year term as Chair of the Black Studies Department. The evidence at trial and, therefore, the foundation of any appellate review, showed conclusively that there was no consideration by the Petitioners at either their October 28, 1991 Board meeting or their March 23, 1992 Board meeting, of any incident in which the Respondent is alleged to have been involved and which would have justified their action against him. If any of the incidents in which the Respondent was alleged to have been involved were of real concern to the Petitioners, there were established procedures through which the Petitioners could have acted against the Respondent, if the alleged incidents, individually or taken together, rose to the level necessary to justify Respondent's removal or denial of his term as Chair of his Department. No such procedures were ever employed. The only matter considered by the Petitioners in their decision to deny Respondent his term as Chair, was his Speech.

Petitioners mis-state the case in their presentation to the Court. The true statement of the case is a simple one. The Petitioners denied the Respondent his duly elected three year term as Chairman of the Black Studies Department because the Petitioners disagreed with the content of the Respondent's Speech on a matter of public concern. There are no frills, bells or whistles here, and it is because of the sheer simplicity of the case that Certiorari must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners operate and manage a public institution formed and operated to provide a means through which members of the public can obtain, at reasonable cost, a quality education.

The function of the Petitioners is to manage this institution and its delivery of educational services, not to control or limit the protected ideas, thoughts and speech of individuals, even individuals who are their employees. New York Education Law Section 6201 et. seq. (McKinney 1985)

To grant the petition would confuse the already established principles upon which existing case law is based with respect to the application of First Amendment protection to public employees.

I.

THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

A.

The Petitioners attempt to establish a conflict between the decision of the Second Circuit Court of Appeals and this Court and other Courts of Appeals by citing cases in which action against public employees as a consequence of their speech was upheld. In each of the cases cited and relied upon by the Petitioners, there is a consistent fact pattern that is clearly distinguishable from the facts in this case. In all of the cases relied upon by the Petitioners, the public employer acted when an employee engaged in speech related to, in the course of, or in some way directly affecting, his or her employment. In these

cases, including *Hall v. Ford,* 856 F.2d 255 (D.C. Circuit 1988); *Connick v. Meyers,* 461 U.S. 138 (1983); *McMullen v. Carson,* 754 F.2d 936 (11th Cir. 1985); *Mings v. Department of Justice,* 813 F.2d 384 (Fed. Cir. 1987); *Dartland v. Metropolitan Dade County,* 866 F.2d 1321 (11th Cir. 1989); *Benson v. Allphin,* 786 F.2d 268 (7th Cir.) *cert. denied,* 479 U.S. 848 (1986); and *Waters v. Churchill,* 114 S.Ct. 1878 (1994), the speech in question was either a direct criticism of the employer or a practice or policy of the employer, such speech having an impact on the effective and efficient operation of the employer or the confidence or morale of other employees, or, as in *McMullen,* speech creating a situation directly and negatively impacting the employer's ability to effectively perform the public service it was responsible for performing. In *McMullen,* an employee of the sheriff's department publicly announced his active involvement with the Ku Klux Klan, a group known to be violent and lawless. Such a public pronouncement was cleary likely to disrupt the ability of the employer to function effectively with that part of the public likely to be victimized by the Klan, and to hamper the ability of the employer to enforce the law when investigating or confronting the Klan's activities. The employee in *McMullen,* as a law enforcement employee, faced a more rigid standard than the one to be applied to Respondent.

In *Waters,* a nurse is alleged to have spoken ill of her employer, a public hospital, and its programs. *Waters* is heavily relied upon by the Petitioner, but it sheds no new light on the issues already decided by the Court of Appeals. *Waters* is consistent with its predecessors which permit action against public employees whose speech hampers or negatively impacts the ability of a public employer to function or to maintain the confidence of its

other employees. *Waters*, however, does not relate to speech that does not involve or affect the function of the employer or the duties of the employee. What *Waters* does do is to confirm the principles established by *Connick* and more clearly define the requirements of *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Connick*, the Court established that the state, as employer, had the burden of justifying a particular discharge but that that burden varied depending upon the nature of the employee's expression. The Court was balancing the interest of the state against the interest of the employee and defining the weight of the employee's interest according to the nature of the speech in question and the real or perceived nature of the impact of the speech. The Court held that "Although such particularized balancing is difficult, the court must reach the most appropriate possible balance of the competing interests." *Connick*, 461 U.S. at 150. After balancing the interests of the parties in *Connick*, the Court upheld the employee's discharge because her speech involved direct criticism of the policies and practice of her employer to the extent that it was likely to disrupt the effective and efficient operation of the work place. The Petitioners place a great deal of faith in their interpretation and application of *Connick*, especially that aspect of *Connick* that supports the notion that a likelihood of disruption, resulting from an employee's speech, is sufficient to justify employer action against the employee. In supporting this notion, the *Connick* Court offered that it did not "see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action". *Id.* at 151-152. The Petitioners seize upon this language and use it to sup-

port their contention that a reasonable expectation of harm is sufficient to balance the equities fully in their favor. Even if expectation were sufficient here, it must be in good faith and it must have some reasonable connection to the time and method of its' application. In this case, the Petitioners investigated the impact of the Speech on the Respondent's ability to function as Chair of his department. The conclusion reached by the Petitioners as a result of that investigation was that Respondent was performing his duties adequately and that he continued to work, without handicap, with all elements of the University community. In particular, the Respondent continued to function as a member of the College's Personnel and Budget Committee, at which he successfully participated, along with other department chairs, in the formation of College-wide interests and policy. Whatever fears the Petitioners may have had immediately following the Speech were in reality dissipated over time, and certainly by the time of the March 23, 1992 Board meeting, at which the Respondent was denied the balance of his duly elected three year term as Chair. The Petitioners were on notice that there was no actual harm to the University, the College or the Black Studies Department as a result of the Speech, and that given the passage of time (eight months following the date of the Speech), it was not likely that there would be any disruption. The Petitioners were required to act in good faith with respect to the action they took against the Respondent. This they did not do, and as a consequence they failed to sustain their burden at trial. In reaching this conclusion, the District Court followed a principal later enunciated in *Waters,* that the "courts should look to the facts as the employer reasonably found them to be". *Waters,* 114 S.Ct. at 1889. This does

not require that the court, in the face of overwhelming evidence to the contrary, believe a set of facts advanced by the Petitioners that are simply not true. At the time the Petitioners took action against the Respondent, what they reasonably found to be the facts was not in any way supportive of a conclusion that the Respondent's Speech was disruptive, or that there still remained any reasonable basis for an expectation of disruption.

The Petitioners had an opportunity to act on any "reasonable fears" before they had information sufficient to conclude that the Speech did not affect the efficient operation of the University, the College or the Black Studies Department. This they did not do and as a consequence of that failure, they have waived and forfeited any opportunity to argue the innocence of reasonable expectation of harm.

Assuming arguendo that the Petitioners could effectively argue that they reacted reasonably and in good faith to a reasonable fear and concern that the Respondent's remarks would hamper the Petitioners' operation, such a conclusion would not end the Court's consideration of the matter, it would only begin the Court's consideration of the balancing test required by *Pickering*. Even where actual disruption is found, it is only a weight on the scales used by the Court to balance the interests of the parties. *Porter v. Califano*, 592 F.2d 770, 773-74 (5th Cir. 1979). Such a balancing process would pit the interests of the Respondent in speaking as a private citizen on a matter of great public concern, against the interest of the Petitioners in maintaining an effective and efficient work place. To reach a reasonable and just conclusion, the District Court did consider and weigh the Petitioners' expectations against the First Amendment interests of the Respondent, and found the Respondent's

interests to be of greater weight. Moreover, in accordance with this Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), the District Court examined the "extent of authority and public accountability" the Respondent's role as employee entailed. What the District Court found, based on the undisputable evidence produced at trial, was that the Respondent's role as Chair was, as Vice-Chancellor Diaz so properly defined it, not mangerial. In addition, an examination of the By-Laws of CUNY, even the provision relied upon by the Petitioners, defines a role and authority limited to the leadership and representation of the Department. The Petitioners have quoted Section 9.1(c) of the By-Laws, but in a disjointed and deceptive way. The full text presented in its proper context is more revealing, and not likely to give this Court the impression that the role of university spokesman or policy maker is a part of the Respondent's duties. 9.1(c) states in pertinent part:

> The President shall base his/her recommendation on the capacity of the individual selected to act effectively as the *departmental* administrator and spokesman and as a participant in the formation, development and interpretation of college-wide interest and policy.[5] (emphasis added).

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[5]The only vehicle through which a Department Chair participates in the formation of college-wide interests and policy is the College Personnel and Budget Committee, the function of which is to deal with issues affecting tenure, staffing and budget concerns affecting the college and the various departments. The process is not a public one.

B.

Petitioners raise a question as to the degree to which the Respondent's Speech constituted expression on a matter of public concern. While they concede that parts of the Speech dealt with matters of public concern, they argue that other parts, apparently any part in which the Respondent mentioned the ethnic background of critics or opponents of the type of curriculum reform he advocated, were not protected. The issues raised by the Respondent in his Speech, including the ethnicity of those who constituted a major and organized element of the opposition to the kind of curriculum reform desired by African Americans, were matters of public concern. Certainly conflict between ethnic groups in America on matters of importance to large segments of our society are important public issues. To some, the Respondent's Speech represented verbal tumult, promoted discord and contained offensive utterances. To this Court, such elements of speech must be tolerated as a necessary side effect of the process of open debate. *Waters*, 114 S.Ct. at 1886. That process has in fact spurred a great deal of thought and interaction across this country on the topics identified in the Speech. From the issue of multicultural curriculum to the role of Jews in the Trans-Atlantic slave trade, the issues addressed by the Speech have become a part of the American landscape of debate. At the time of the Speech there were, in national periodicals, 3,780 articles on the topics covered in the Speech. Since the Speech, the number of articles has risen to 10,659.[6] Certainly, there has been, and there is, a serious public interest in the topics covered in the Speech, including the unpleasant subject of the conflict of ideas

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[6]Source: WestLaw Data Base, Periodicals.

and goals between African Americans and Jews. The Petitioners would have this Court stifle the discussion and debate which the Speech was an integral part of. This Court has already determined that such speech is protected.

C.

On the question of qualified immunity, the Petitioners have again failed to properly and honestly present the facts to this Court, and they compound that failure by misinterpreting the applicable case law. The relevant facts are that the Petitioners were advised by their counsel, Vice Chancellor Diaz that they could not punish the Respondent because of his Speech (Petition at 7a-8a). In so advising Petitioners, Mr. Diaz informed them of and reviewed with them, the decision of the District Court in the matter of *Levin v. Harleston*, 770 F. Supp. 875 (S.D.N.Y. 1991), a case involving a white CCNY professor who made racist and bigoted remarks about blacks. In *Levin*, the District Court ruled that his speech, bigoted though it was, was protected. Mr. Diaz advised the Petitioners that the *Levin* decision was controlling and that they should act accordingly when considering reaction to the Respondent's speech. In response to this advice, the Petitioners designed a scenario intended to mask the true reason for the action they would take against the Respondent. At trial, of course, the mask of deception was removed and the truth was uncovered by the trier of fact. That truth was that the reasons advanced at trial by the Petitioners to justify their action against the Respondent were a pretext, intended to protect them from liability by hiding the true motive for their actions. Once that pretext was exposed and the nature and extent of their knowledge of the clearly established

statutory or constitutional rights they were violating became apparent, the District Court was correct in denying the Petitioners qualified immunity.

There is no special consideration in a qualified immunity case just because it is considered in the context of a *Pickering* claim. The applicalbe law is the same, regardless of the underlying claim. As in *Benson v. Allphin,* 786 F.2d 268 (7th Cir. 1986), where the court engaged in a balancing test to determine whether the employer's "interest in the proper functioning of his office outweighed Benson's First Amendment interests. . ." *Benson* at 271-272, the District Court, separate from the balancing of the interests, considered the question of qualified immunity in the context of the well established case law. The standard is the same in all of the cases cited, the nature and extent of the defendant's knowledge of the clearly established statutory or constitutional rights of which reasonable persons should have known. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092 (1986); *Matherne v. Wilson,* 851 F.2d 7752 (5th Cir. 1988).

II.
THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI.

Certiorari is granted "only when there are special and important reasons therefore". Rule 10.1. This case does not present special or important reasons that will justify this Court considering issues that have already been decided in conformance with the governing law.

The Petitioners litigated and lost the *Levin* case but chose not to appeal the Appeal Court's decision upholding the District Court judgment. *Levin v. Harleston,* 770

F. Supp. 895 (S.D.N.Y. 1991) aff'd in part and vacated in part, 966 F.2d 85 (2d Cir. 1992). In this case the Petitioners have different political considerations and feel compelled to appeal. This Court would become the vehicle for the Petitioners' personal political agendas if it were to accept this case for review. As this case is strictly a First Amendment case from the academic arena, with no special qualities except for its political implications, there are no special or important reasons warranting the granting of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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